Commerce, Commonality, and Contract Law: Legal Reform in a Mixed Jurisdiction

Christopher K. Odinet
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*Christopher K. Odinet*

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INTRODUCTION

The struggle between making progress and preserving tradition is as old as time.1 On the one hand, progress is needed to move forward, to grow, to expand, to become more prosperous, and—perhaps most importantly—to prevent being left behind.2 On the other hand, tradition is what links society to its past, gives a sense of history and roots, and creates a common culture that binds everyone together.3 In the context of legal reform, how does one move a legal system forward, yet still maintain the institutions that make such a system so unique?

In many ways, tradition and reform are natural adversaries. The former calls for a preservation of the known, of the familiar, and of the steadfast, while the latter calls for a questioning of the status quo and skepticism about the current state of affairs. A given country’s long-standing legal institutions bring about a sense of comfort and predictability and engender a feeling of expertise and common knowledge. Often times these traditional legal concepts come about due to the particular history, characteristics, and experiences of the people who have lived in the locale over time.4

As such, the legal tradition of a place is intimately bound up in the very culture and spirit of its people. Historical laws create a sense of community such that those who belong to the community may be readily identified, and those who are outsiders are disadvantaged and kept at a distance.

Legal reform, on the other hand, plays quite the opposite role. It challenges the historical and the traditional in a quest to find the new and the better. Reform is often undertaken when traditional institutions prove to be out-muted or inefficient in the face of changing economic, cultural, or political forces. Further, reform often accompanies larger regional or global movements toward uniformity or harmony among various laws—particularly in the commercial context. As such, legal reform seeks not to maintain the divide between those on the inside and those on the outside, but rather to break down barriers such that persons have equal opportunities and a level playing field from which to operate and interact.

But legal reform never happens in a vacuum. As lawmakers engage in the process of revising, amending, or completely overhauling a given set of laws, the process is heavily influenced by psychological and sociological undercurrents, which can frequently operate at a subconscious level. While the intent may be to replace or supplant a given area of the law with a completely new system, the innate pull of the past and the powerful influence

history in the interpretation of American constitutional principles); see also Stuart Banner, Legal History and Legal Scholarship, 76 WASH. U. L.Q. 37, 42–44 (1998).


of tradition often pervade and inform the legal reform process. An unwillingness to surrender traditional institutions which have been such an important part of the history and culture of a given jurisdiction can weaken, hinder, or even thwart good-intentioned efforts to revise and reform the law to make it more modern and efficient. Thus, in order to engage in truly effective legal reform in any particular area of the law, it is necessary to understand the role that tradition and history can play in influencing the lawmaking process so as to ensure that reforms are done in a way that creates a truly clear, competitive, and coherent body of laws that reflect the public policy goals of the people.

This Article is concerned with the tradition–reform dichotomy as it exists in certain jurisdictions that, because of their unique history and nature, are particularly susceptible to the struggle between legal tradition and legal reform—mixed jurisdictions. In order to more closely examine this struggle and its theoretical and practical effects, this Article analyzes the role that traditional legal institutions play in the law reform process through the lens of America’s lone mixed jurisdiction—Louisiana—and how this struggle results in an anchor-like legal conundrum.

Through an exploration of Louisiana’s subtle, yet prevalent, anchor effect caused by the struggle between progress and tradition—the process of mooring one’s self to existing institutions to such a degree that newly adopted institutions are rendered less effective and the law as a whole suffers—one is able to extrapolate as to how traditional and historical forces play a role in the much larger sphere of mixed jurisdictions globally. This investigation is accomplished by analyzing two major commercial law concepts that have been the subject of the collision between legal reforms on the one hand and the maintenance of existing civil law institutions on the other. Specifically, this includes reviewing the interaction between the civil law’s traditional warranty of condition in the sale of property—redhibition—and its interplay with the American Uniform Commercial Code’s similar concept—the warranty of

10. See infra Part IV.B.
11. See generally DIAN TOOLEY-KNOBLETT & DAVID GRUNING, SALES §§ 11:1–11:48, in 24 LOUISIANA CIVIL LAW TREATISE (2012) (Redhibition is a civil law-based, Louisiana-specific legal institution dealing with the warranties provided by sellers to buyers relative to the condition of the thing sold); PETER S. TITLE, LOUISIANA REAL ESTATE TRANSACTIONS § 10:82 (2d ed. 2006) (distinguishing redhibitory defects from restrictions on use); Elizabeth A. Spurgeon, Comment, All for One or Every Man for Himself? What is Left of Solidarity in Redhibition, 70 LA. L. REV. 1227 (2010) (providing a historical account of redhibition under Louisiana law).
fit. Also, Louisiana’s quasi-adoption of the common law doctrine of unconscionability in contracts is explored against the backdrop of one of Louisiana’s traditional civilian institutions of contractual vices known as lesion beyond moiety. Lastly, this Article explores the broader social science and psychological aspects behind this anchoring effect by exploring society’s inherent desire to hold on to traditional customs and practices, and to resist, even if only subconsciously, certain change.

Through an understanding of these Louisiana legal concepts and institutions—sometimes identical, other times opposing—and their interplay, one gains a better recognition and understanding of the anchor effect and its negative consequences, particularly in the commercial law realm, on all mixed jurisdictions. And through such an understanding, mixed jurisdictions are better able to structure their laws so that their public policies with respect to commercial viability and competitiveness are furthered and in harmony with—rather than frustrated, undercut, or anchored down by—their traditional and historical institutions.

I. AMERICA’S LONE MIXED JURISDICTION—LOUISIANA

Although this Article explores the legal tradition–reform struggle in Louisiana in order to extrapolate the anchor effect’s impact on mixed jurisdictions worldwide, it is essential that one have a general understanding and appreciation of the nature and history of mixed jurisdictions. It is through an appreciation of the distinctive condition, history, and culture that informs the law making process in these unique locales that one can perceive how acute the struggle between tradition and reform can be in the binjural experience.

A. An Overview of Mixed Jurisdictions

Although no official definition exists, the preeminent Scottish comparative law scholar Sir Thomas Smith described mixed jurisdictions as those that are “basically a civilian system that had been under pressure from the Anglo-American common law and has in part been overlaid by that rival system of jurisprudence.” In America, Louisiana clearly fits into this dichotomy, but so do

12. See infra Part I.B.
13. See infra Part III.A.
14. See infra Part IV.
many other countries, the legal foundations of which are built on the civil law, but because of force, necessity, or time have been built up with common law institutions. Some of these better-known localities include South Africa, Scotland, Israel, Puerto Rico, the Philippines, and Quebec.

Understanding the features of what makes a country a mixed jurisdiction is essential to appreciating its susceptibility to the anchor effect. The noted civil law and comparativist scholar Vernon Valentine Palmer describes mixed jurisdictions as exhibiting three principal “lowest common denominator” characteristics. The first involves analyzing the mixture itself. Although it is true that the law of every country is influenced by a myriad of factors such as religious doctrine, Roman law, and custom, only in mixed jurisdictions is a significant body of the country’s law derived solely from the civil law and common law systems. In this way, Professor Palmer directs the analysis toward a sort of threshold requirement—the mere influence of multiple facets and aspects of various laws on the country’s legal system is not enough, but rather a fundamental portion of the law must originate from these two major legal traditions. The second characteristic is more abstract and involves the subconsciousness and psyche of the mixed jurisdiction. Professor Palmer distinguishes countries that merely transplant legal concepts from one tradition to the other from mixed jurisdictions that exhibit a certain cognizance about their bijurality. In a mixed jurisdiction, there is a general affirmative acknowledgement by the legal community that the law of that country represents a fusion of common and civil law concepts. The third and final trait is the law’s structure. In a mixed jurisdiction there will generally be a walling off of certain areas of the law and a sort of demarcation as to which system dominates. For instance, the private law—which includes the law of persons, delicts, family, property, and importantly for these purposes, contracts—will be substantially civilian in appearance and

16. See id. at 7–10.
17. Id. at 13.
18. See id. at 13–14.
19. Id. at 8–11.
20. Id. at 8.
21. Id.
22. See id.
23. Id.
24. Id. at 9.
25. Id.
26. Id. at 8–9.
27. Id. at 9–10.
order.28 On the other hand, public law in such a jurisdiction—comprising the separation of governmental functions, the role of the judiciary, and constitutional rights—will be led by the English tradition.29

Much like with Louisiana, many mixed jurisdictions acquired their bi-jural character through a series of intercolonial transfers between traditionally civil law countries (such as France and Spain) and countries that were dominated by the common law (such as Britain and the United States).30 That is not to say that when a traditionally civil law country came under the control of a common law government that a change or mixing of legal systems was a forced or even immediate event.31 On the contrary, many times the change and mixing came gradually.32 For instance, Quebec was ceded by France to Great Britain at the conclusion of the Seven Years War in 1763.33 Puerto Rico and the Philippines came under United States control after the Americans defeated Spain in the Spanish-American War.34 After such conquests or annexations, the new governments would often impose traditional common law structures in the area of public and criminal law, but leave the civil law in place to be more gradually assimilated.35 This was done, in large part, for political reasons as the imposition of a new system of private law in largely non-Anglophonic populations could prove disastrous and disrupt public order and stability.36 Instead, the strategy for a more slow and steady integration was adopted.37 It is through this gradual assimilation of common law concepts into the private civil law system of mixed jurisdictions that the right conditions were created for the anchor effect to arise and take hold.38

This Article focuses on the anchor effect’s impact on commercial law because, both historically and in modern times, it is the area of the law that is most susceptible to the tradition–reform struggle.39 As briefly discussed above, the maintenance of the civil law in the area of private transactions can be best

30. See id. at 25.
31. Id. at 27.
32. Id.
33. Id. at 26.
34. Id.
35. Id.
36. Id. at 27, 29.
37. Id. at 27, 79–81.
38. See id.
39. Id. at 79.
described as a means to keep the peace and stability of a newly conquered or annexed country. Instead of imposing the common law upon all private matters immediately, a more gradual assimilation was favored. Maintaining existing commercial laws, at least for the time being, served a particularly useful purpose for these colonial powers. Commercial laws are those that govern the everyday interactions of private individuals. The very economic viability of a country—from the purchasing of food and goods to the selling of wares—is rooted in its commercial laws. The importance of these constructs is even more evident when viewed through the lens of colonial mercantilism, which sought in many ways to strengthen the economic might of the parent country by utilizing the resources of its colonial holdings.

So although mixed jurisdictions acquired their unique bijural personalities through their colonial experiences, it was specifically their commercial viability—either for their merchant and maritime successes or their lucrative natural resources—that made these areas attractive to colonial powers to begin with. Because a country’s commercial strength or potential held such a prominent place in what made it so desirable for conquest, it is natural that the civil law institutions governing such commerce would be held dear by its people. Further, the people of these conquered or annexed countries were typically mistrustful of their new rulers and displayed a strong desire to hold on to their cultures and traditions, and the law of the marketplace was an obvious object for such affinity. Thus, this area of private law was a natural anchoring point for these newly subjugated societies—as all other semblances of self-government and control were pulled away and replaced with colonial, public law structures. Thus, maintaining the private law

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40. Id. at 26–27.
41. Id. at 27, 79–81.
42. Id.
43. Id.
then in place was a way to feel a sense of self-preservation and permanence.\textsuperscript{48}

As for the early common law rulers of these mixed jurisdictions, they would find it more politically expedient to allow existing commercial laws to remain in place since the dominant social groups of the area had such strong cultural ties to them.\textsuperscript{49} The calculation was often made that the invisible hand of the larger regional, continental, or global marketplace would eventually push away existing civilian commercial institutions to make room for more dominant common law concepts.\textsuperscript{50} As Professor Palmer notes, the assimilation of common law or more mainstream commercial concepts did not come from outside forces, but from internal business interests desiring to align the country’s economy more closely with prevailing commercial practices.\textsuperscript{51} Thus, just as discussed below in the case of Louisiana, it was self-interest and economic motivation that gave birth to the incorporation of foreign legal concepts into the traditionally civil law sphere of these jurisdictions.\textsuperscript{52}

In reviewing this interaction and gradual, but voluntary, assimilation, one can easily see how the symptoms so common to the anchor effect could arise. First, each country was allowed to keep an area of the law that was culturally and historically its own, despite the fact that the new colonial power was substituting common law structures for the domestic public laws then in place.\textsuperscript{53} Because this one area was allowed to remain, it would serve as a natural source of pride and attachment for the country.\textsuperscript{54} This is particularly true since the area of commercial law is chiefly concerned with the livelihood and economic prosperity of the country and its people.\textsuperscript{55} However, by the same token, prevailing commercial practices—either of the governing country or of the region—would be brought to bear on the idiosyncratic nature of the existing civil law institutions.\textsuperscript{56} For instance, South Africa, a country that is historically civilian in nature, would feel the

\textsuperscript{48.} Id. at 26–27.
\textsuperscript{49.} See id. at 27–29.
\textsuperscript{50.} Id. at 79–81.
\textsuperscript{51.} Id. at 81.
\textsuperscript{52.} See id.
\textsuperscript{53.} Id. at 26–27.
\textsuperscript{55.} See Palmer, supra note 15, at 79–81.
\textsuperscript{56.} Id.
economic impetus to fashion its laws to more closely resemble the
laws of Great Britain, which historically dominated the global
commercial marketplace.\textsuperscript{57} Similarly, Puerto Rico and the Philippines
would also feel the need to adapt to the commercial practices of its
American rulers whose economic influence infiltrated commercial
and business transactions worldwide.\textsuperscript{58}

In sum, the human tendency to anchor one’s self to the familiar,
the traditional, and the well-known is powerfully exemplified in the
experience of mixed jurisdictions. Through this dichotomy it is easy
to see how, in the legal reform process, efforts would inevitably be
made to keep certain traditional laws in place even when similar,
duplicative, or even conflicting new laws were enacted. This
would seem particularly true given the strong desire of conquered
countries to retain aspects of their law that had long enjoyed strong
cultural significance.\textsuperscript{59} The unique and singular nature of mixed
jurisdictions—representing a stand-alone holdout of the civil law
tradition, yet encircled by prevailing common law forces—makes
them all too susceptible to the anchor effect. As discussed below
through the lens of Louisiana’s bijural experience, this ever-so-
subtle effect can lead to the enactment of a scheme of laws that
attempts to fulfill two goals—a preservation of tradition and a
desire to create a more clear and competitive body of laws—but in
the end achieve neither.

\textbf{B. The Louisiana Bijural Experience}

A great deal of Louisiana law is derived from the civil law
tradition,\textsuperscript{60} whereas the rest of the United States follows that of the
common law.\textsuperscript{61} Because of its unique status, legal scholars have
often declared that Louisiana is a civil law island floating in a sea
of common law jurisdictions—a mixed jurisdiction.\textsuperscript{62} Going back
to its early history, Louisiana adopted and was chiefly influenced
by the French (and some argue equally so by the Spanish) civil
law.\textsuperscript{63} In fact, many provisions of today’s Louisiana Civil Code

\begin{itemize}
  \item \textsuperscript{57} Id. at 81–82.
  \item \textsuperscript{58} Id. at 85–86.
  \item \textsuperscript{59} Id. at 26–27.
  \item \textsuperscript{60} See A.N. Yiannopoulos, \textit{Property} § 6, \textit{in} \textit{2 Louisiana Civil Law Treatise} 10–11 (4th ed. 2001).
  \item \textsuperscript{61} See E. Allan Farnsworth, \textit{An Introduction to the Legal System of the United States} 15 (Steve Sheppard ed., Oxford Univ. Press, 4th ed. 2010).
  \item \textsuperscript{62} See Palmer, \textit{supra} note 15, at 80–81.
  \item \textsuperscript{63} See generally Rodolfo Batiza, \textit{Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder}, 46 Tul. L. Rev. 628, 634 (1972) [hereinafter


still resemble complimentary provisions in France’s Code Civil as enacted in 1804.64 Louisiana scholars view its legal system as unique and as something to be treasured, rather than as mere relics of the past.65

At various times in its long history, Louisiana has waged several long, hard-fought battles to maintain its civilian identity.66 In 1803 when the United States first took possession of the Louisiana territory, the then-existing laws consisted of French and Spanish laws and legal customs that were derived from the territory’s former colonial rulers.67 At the time of annexation by the United States, the territorial Superior Court—in order to


64. See, e.g., Pitre v. Pitre, 183 So. 2d 307, 309 (La. 1966) (noting that “Article 891 of the French Civil Code . . . is the same as our Article 1408”); see also Placid Oil Co. v. Taylor, 325 So. 2d 313, 316 (La. Ct. App. 1975) (“The provisions of LSA-C.C. art. 2190 are substantially the same as those contained in Article 1273 of the French Civil Code.”); A.N. Yiannopoulos, Creation of Servitudes by Prescription and Destination of Owners, 43 LA. L. REV. 57, 63 (1982) (“Article 728 of the Louisiana Civil Code of 1870 was the same as article 52 of the Louisiana Civil Code of 1808 and article 689 of the French Civil Code.”).

65. See generally A.N. Yiannopoulos, On the Bicentenary of the Louisiana Supreme Court: Chronicle of the Creation of a Unique and Beautiful Legal Tradition, 74 LA. L. REV. 649 (2014) (extolling the virtues of the civil law); see also John H. Tucker, Jr., The Jurisconsult, 45 LA. L. REV. 1011 (1985) (“Tucker initiated a movement at Louisiana State University for the creation of an Institute devoted to legal research and law revision. In his words, the civil law was historically a body of law expounded by jurisconsults, a university made law, and a hope for the preservation and expansion of the Louisiana legal tradition depended on the development of an indigenous legal scholarship.”).

66. PALMER, supra note 15, at 260–64.

67. A great deal of debate exists regarding whether it was actually French or Spanish law that predominated the law of Louisiana at the time. See generally Yiannopoulos, The Early Sources of Law, supra note 63, at 96, 100–03.
solidify the civil law’s continued use despite the state’s new American masters—stated that “Roman, Spanish, and French civil law would be enforced as the customary law of the territory in all cases.”68 This was followed by an act of the Louisiana Legislative Council and House of Representatives that affirmed the sentiments of the Superior Court in upholding Louisiana’s existing civil law institutions.69

However, Governor W.C.C. Claiborne, the new congressionally appointed chief executive of Louisiana, vetoed the legislative act, declaring that the power to determine whether the civil law continued to be in effect in Louisiana was solely the prerogative of the United States Congress.70 In response to this affront, the Louisiana Legislature resigned en masse in protest, which was then followed by a manifesto, signed by the president of the Legislative Council and published in the New Orleans newspaper, decrying the governor’s veto.71 This manifesto affirmed Louisiana’s strong commitment to the civil law and expressed an aversion to American interference in an area that “embodied their cultural heritage and assured the stability of social and economic relations.”72 The Legislature then reconvened on June 7, 1806, and commissioned the esteemed lawyers and legal scholars James Brown and Louis Moreau-Lislet to draft a formal civil code for the Louisiana territory.73 Acknowledging the strong sentiment of the people of Louisiana in retaining their cherished civil law tradition, Governor Claiborne acquiesced.74 Years later, looking back on this early struggle in his governorship over Louisiana, Claiborne stated:

We ought to recollect . . . the peculiar circumstances in which Louisiana is placed, nor ought we to be unmindful of

70. See id.
71. See id. at 30.
72. Id. at 29 (emphasis added). A portion of the manifesto states:
We certainly do not attempt to draw any parallel between the civil law and the common law; but, in short, the wisdom of the civil law is recognized by all Europe; and this law is the one which nineteen-twentieths of the population of Louisiana know and are accustomed to from childhood, of which law they would not see themselves deprived without falling into despair.

Id.
73. See Yiannopoulos, The Early Sources of Law, supra note 63, at 91.
74. See id.
the respect due the sentiments and wishes of the ancient
Louisianans who compose so great a proportion of the
population. Educated in a belief in the excellences of the
civil law, the Louisianans have hitherto been unwilling to
part with them.

Then, at the turn of the 20th century, a young Louisiana law
professor declared that, in essence, Louisiana had become simply
another common law jurisdiction. This statement set off a
firestorm of scholarly debate and rebuttals that further solidified
Louisiana’s commitment to the civil law. From that time up to
present day, Louisiana has continued to show its commitment to
the civilian cause through the establishment of various societies
and organizations formed to specifically explore and celebrate the
civil law tradition. Even an entire agency of state government is
dedicated to preserving and studying this distinctive aspect of
Louisiana. To Louisianans, as with all mixed jurisdictions, the
civil law heritage holds a special place, both in its past and in its
present, in what makes the jurisdiction so distinctive and unique.

However, although appreciating and preserving the past is
praiseworthy, Louisiana’s leaders—like those of all mixed
jurisdictions—also recognize that in order for the state to have an
economy that can compete on the regional and national level, as
well as attract individuals to settle and make a life within its borders,
new ideas and reforms are necessary. The law as it existed in 19th
century France does not always serve the same utility today as it

75. HERMAN, supra note 69, at 31 (citing letter from Governor W.C.C.
Claiborne to Judge J. White (Oct. 11, 1808), in IV OFFICIAL LETTER BOOKS OF
W.C.C. CLAIBORNE (Dunbar Rowland ed., 1917).

76. See Gordon Ireland, Louisiana’s Legal System Reappraised, 11 TUL. L.
REV. 585, 596 (1937).

77. See Daggett et al., supra note 63. A further vibrant scholarly debate
arose in the 1970s that consisted chiefly of trying to ascertain exactly which
civil law sources (i.e., French law or Spanish law) had the greatest influence on
Brown and Moreau-Listlet when drafting their digest of civil laws. See Batiza,
Sources of the Civil Code of 1808, supra note 63; Batiza, The Louisiana Civil
Code of 1808, supra note 63; Pascal, supra note 63; Sweeney, supra note 63.

78. See, e.g., Albert Tate, Jr., Tucker and the Society of Bartolus, 45 LA. L.
REV. 1017 (1985) (describing Louisiana’s private society of lawyers, judges,
and law professors dedicated to providing an ongoing scholarly discourse on the
civil law); William E. Crawford & Cordell H. Haymon, Louisiana State Law
Institute Recognizes 70-Year Milestone: Origin, History and Accomplishments,
56 LA. B.J. 85 (2008) (describing the legislative agency charged with being the
official law reform arm of the state of Louisiana, as well as highlighting its
various accomplishments).

79. See generally William E. Crawford, The Louisiana State Law Institute—
History and Progress, 45 LA. L. REV. 1077 (1985).
did long ago.\textsuperscript{80} Louisiana, although once predominantly rural and agrarian, has changed and evolved over time.\textsuperscript{81} United States industry, shipping, energy, and various commercial enterprises occupy a prominent place in the state’s economy.\textsuperscript{82} These industries and the ways in which they do business require a sophisticated and complex legal system in order to facilitate an efficient and successful marketplace. Louisiana’s economy no longer stretches merely up and down the Mississippi River and across the various parishes of the state. Rather, Louisiana operates in a much larger marketplace where goods are bought and sold and transactions are consummated globally across borders and boundaries. Similarly, travel between the states has greatly increased since Louisiana’s early days, resulting in many residents of the state having migrated from areas far across the country.\textsuperscript{83}

As a result of the ever-changing and expanding national economy and the inherent desire to meet the expectations of modern American society, Louisiana law, like that of many mixed jurisdictions, has been forced to venture off its civil law island and adapt to the world around it. Concepts and institutions from other states and other countries have been enacted and incorporated—both by Louisiana’s Legislature and its courts—in order to meet the needs of a robust and dynamic world. Louisiana has, at various times, dipped its toes into the common law sea and slowly but surely co-opted or directly enacted various common law concepts and uniform statutory provisions into its own legal system.\textsuperscript{84}

And yet, Louisiana’s civil law has not been jettisoned altogether. As a state so deeply immersed in culture and history—and having

\begin{itemize}
  \item \textsuperscript{80} See, e.g., Christopher K. Odinet, Comment, \textit{Laying to Rest an Ancien Régime: Antiquated Institutions in Louisiana Civil Law and Their Incompatibility with Modern Public Policies}, 70 \textit{LA. L. REV.} 1367 (2010).
  \item \textsuperscript{81} See id. at 1368.
  \item \textsuperscript{82} See, e.g., LOREN C. SCOTT, THE ENERGY SECTOR: STILL A GIANT ECONOMIC ENGINE FOR THE LOUISIANA ECONOMY (2011); STEPHEN FOWLER, EUNJI KIM, MONICA KINCHEN & MITCHELL ARONOV, LOUISIANA MANUFACTURERS REGISTER (2013).
\end{itemize}
fought so vigorously in the past to preserve its legal heritage—such a move would be abhorrent to Louisiana’s sense of pride and identity. Instead, existing civil law institutions will often remain in place, despite the enactment of new, foreign provisions.85 This is true even when the subject matter of the new law and that of the existing civil law institution occupy the same or similar spaces.86 Remedies will sometimes be created that are familiar to national and mainstream interests, even when functionally equivalent rights already exist under the state’s civil law scheme.87 Even worse, prevailing doctrines under the common law will be grafted into Louisiana jurisprudence, even when they conflict or cause friction and confusion with existing civilian concepts.88

Because of this anchor effect—the reaching into the common law waters in order to better compete on the national stage, while still keeping camp on the civil law island in order to preserve a sense of tradition and identity—many areas of Louisiana law have actually become less competitive, less mainstream, and less in line with modern expectations.89 Lawyers and courts dealing with these conflicting and overlapping institutions are often left confused as to which concept is more applicable or should govern, and the result can be a conflation of different doctrines and policies.90 The end result is anything but a more competitive, clear, and uniform legal system and does a great injustice to the very civil law tradition it seeks to honor.91 Through an understanding of these various Louisiana concepts and legal institutions discussed in the following sections and their interplay, one gains a better recognition and understanding of the anchor effect and its negative consequences in all mixed jurisdictions.

II. ANCHORING THE LAW OF WARRANTIES OF CONDITION

Regardless of the jurisdiction, a primary goal in contracting for the sale of property is for the buyer to know exactly what he is purchasing and for the seller to be clear as to exactly what he is selling.92 The buyer has certain expectations and makes certain assumptions about the property that motivates and further his desire to consummate the deal. Likewise, the seller has certain

85. See, e.g., infra Part II.A.
86. See infra Parts II–III.
87. See infra Parts II–III.
88. See supra Parts I–III.
89. See infra Parts II–III.
90. See infra Parts II–III.
91. See infra Parts II–III.
92. UGO MATTEI, BASIC PRINCIPLES OF PROPERTY LAW 100 (2000).
impressions and understandings about what the buyer believes he is receiving and what exactly the seller believes he is offering. Clarity on these points is, in great part, what lends consistency to the marketplace and makes a stable economy possible.93

In Louisiana, like many mixed jurisdictions, these important goals are achieved, in part, through implied warranties of condition.94 In essence, these warranties consist of certain promises that the seller makes to the purchaser regarding the condition of the property.95 These include warranting that the property is free of certain defects and faults, as well as the promise that the property is fit for use.96 In the event the property fails to meet these conditions, the law allows the purchaser to, among other things, rescind the sale if certain conditions are met.97 Under Louisiana’s civil law—unlike in the common law tradition—warranties of condition arise automatically in each and every sale of property, regardless of whether the parties expressly agree to them.98 They are implied and can only be disposed of through an express and knowing waiver.99

Throughout Louisiana’s history, the principal warranty of condition in the sale of property has been the warranty against redhibitory defects.100 This institution is derived from the Roman and French civil law tradition, and its precepts continue in Louisiana’s law of sales today.101 However, in 1993, as part of an ongoing effort to incorporate more national concepts from the Uniform Commercial Code’s Article 2 provisions on the law of sales of goods (movables), the Louisiana Legislature waded into the waters of its neighboring states and adopted another warranty of condition—the warranty of fitness.102 This institution is different

93. Id. See generally 18 WILLISTON ON CONTRACTS § 52:81 (4th ed.) (describing the use of legal terms-of-art in commercial transactions under the Uniform Commercial Code and at common law, and the effects they have on the relationship and rights of the parties).
95. Id.
96. Id.
97. Id. See also LA. CIV. CODE art. 2531 (2015) (providing for the liability of sellers beyond rescission).
100. See Spurgeon, supra note 11.
101. See id.
102. See LA. CIV. CODE art. 2524 cmt. a (2015).
from redhibition, but it arises under many similar fact patterns, thereby creating frequent overlap, confusion, and conflict between the two devices.\textsuperscript{103} Unfortunately, the interplay between redhibition and fitness has contributed in great part to the confusion of both in-state and out-of-state lawyers and parties when engaging in transactions in Louisiana.

\textit{A. The Civil Law Doctrine: Warranty Against Redhibitory Defects}

The ancient civilian warranty against redhibitory defects grants a purchaser the right to seek the rescission of a sale when the property sold contains a hidden defect.\textsuperscript{104} The rights, requirements, and procedures for redhibition arise under Louisiana Civil Code articles 2520 through 2548.\textsuperscript{105} The primary purposes behind the warranty is to protect unknowing purchasers against dishonest sellers, to restore the parties to their positions prior to the sale, and, when possible, to uphold the stability and sanctity of the transaction.\textsuperscript{106}

A vice or defect in property will give rise to an action in redhibition if it meets certain narrowly drawn requirements.\textsuperscript{107} These include the requirement that the defect render the thing either completely useless or so inconvenient that the purchaser would never have bought the thing had he known of the defect.\textsuperscript{108} A redhibition claim can also arise when, although the thing is not entirely useless or inconvenient, the defect causes the value of the thing to be less than what was originally paid.\textsuperscript{109} Depending on the category of the defect, the court can either undo the sale completely or it can order a reduction of the purchase price.\textsuperscript{110}

\textsuperscript{104} See Title, supra note 11, § 10:64; Tooley-Knoblett supra note 11, § 11:1.
\textsuperscript{106} See Bruce V. Schewe & Debra J. Hale, Obligations, 53 LA. L. REV. 917, 919 (1993); Spurgeon, supra note 11, at 1231–32.
\textsuperscript{107} See LA. CIV. CODE art. 2520 (2015).
\textsuperscript{108} Id.
\textsuperscript{109} See id.
It should be noted that an essential element of redhibition is that the defect must exist at the time the property is purchased, and such a defect must not be readily discoverable by the purchaser.\textsuperscript{111} In other words, the defect must be hidden and latent with respect to the purchaser at the time of the purchase, only rising to the surface at a later date.\textsuperscript{112} Redhibition’s rules even allow for an opportunity to repair and cure a defect when the seller acted in good faith.\textsuperscript{113} These rules exhibit a strong preference in the law of redhibition to, when possible, maintain the integrity of the transaction rather than order it undone.

1. History of the Doctrine

In addition to these laudable qualities, redhibition holds a singular place on the civil law island due to its ancient roots.\textsuperscript{114} And arguably, it is this ancient status that has made the institution so untouchable and, consequently, infrequently amended.

Under Roman law, the first implied warranty of condition arose at the initiative of those public officials who were charged with regulating the marketplace.\textsuperscript{115} Sellers were required to promise their buyers that the thing being sold was free of defects.\textsuperscript{116} If a defect did arise, regardless of whether the seller had knowledge of it, the buyer had an action to undo the sale.\textsuperscript{117} Emperor Justinian, in promulgating his \textit{Digest}, incorporated the Roman law warranty—understood at the time as a type of “aedilician” concept, or rule created by marketplace regulators—as an extension of the general duty of parties to act in good faith in their dealings with one another, but the emperor also made some curtailments.\textsuperscript{118} For instance, the action was not available if the buyer knew of the defect.\textsuperscript{119} Thus, the defect had to be hidden and not readily discoverable at the time of the sale.\textsuperscript{120} Further, the remedy of \textit{quanti minoris} (i.e., a reduction of the purchase price) was added.\textsuperscript{121} Justinian’s revised version of redhibition sought to better

\begin{itemize}
  \item \textsuperscript{111} \textit{La. Civ. Code} arts. 2521, 2530 (2015).
  \item \textsuperscript{112} \textit{See} \textit{La. Civ. Code} art. 2530 (2015).
  \item \textsuperscript{114} \textit{See} Spurgeon, \textit{supra} note 11, at 1230.
  \item \textsuperscript{115} \textit{See id.}
  \item \textsuperscript{116} \textit{Id.} at 1229.
  \item \textsuperscript{117} \textit{Id.} at 1230–31.
  \item \textsuperscript{118} \textit{Id.} at 1231.
  \item \textsuperscript{120} \textit{Id.}
  \item \textsuperscript{121} \textit{Id.}
\end{itemize}
balance the equities between the parties by allowing the action only when the purchaser did not know of the vice in the property. This was meant to avoid situations where cunning purchasers would bring claims frivolously for defects for which they were always aware.122

When the French Civil Code was developed in the early 1800s, much of its concepts were rooted in the ancient Roman law, as well as in Justinian’s *Digest*.123 As such, the law of redhibition was incorporated into the French code.124 The stated purpose of the French law of redhibition was “to protect buyers and the general public against dangers inherent in all products.”125 Like the Romans, the French sought to impose a general, blanket warranty that would automatically arise in all sales in order to further the goal of providing stability, fairness, and predictability in the marketplace.126 Following Justinian’s lead, these French rules were clear, concise, and narrowly tailored so as to apprise all parties as to the safeguards and pitfalls of contracting for the sale of property.127

2. Louisiana’s Incorporation of the Doctrine

The law of redhibition came to Louisiana through its early incorporation into the Louisiana Civil Code.128 In a state whose early history was intertwined with the civil law traditions of France and Spain, the incorporation of redhibition was natural to Louisiana’s early civil code drafters who found more comfort in the traditions of the civil law, rather than the more foreign institutions of the Anglo-American system prevalent throughout the rest of the United States.129 As in its prior iterations, the Louisiana version of redhibition required that the vice or defect in the property be non-apparent, and that both rescission of the sale and reduction of the purchase price be the possible remedies.130

As might be expected, commercial and consumer transactions have, over time, taken on greater complexity. And following the

122. See generally id.
123. See Spurgeon, supra note 11, at 1231; Peter Stein, Roman Law in European History 114–15 (1999).
124. See Spurgeon, supra note 11, at 1231.
125. Id. at 1231–32 (internal quotation marks omitted) (quoting Philippe Malinvaud, Redhibitory Defects and Their Importance in Contemporary Society, 50 Tul. L. Rev. 517, 518 (1976)).
126. See id.
127. Id.
128. Id. at 1232. Herman, supra note 63, at 266.
129. See Spurgeon, supra note 11, at 1232.
natural progression of all mixed jurisdictions, Louisiana has variously added its own nuances to redhition in an effort to modernize and provide more even-handedness and predictability to this institution.\footnote{131} For instance, certain sellers, such as manufacturers, are deemed to have knowledge of a defect, regardless of whether they actually do, because of their unique position as the creator of the thing being sold.\footnote{132} Although many scholars note that this rule had been adopted by courts for many years prior to its legislative enactment, one could nevertheless easily surmise that its direct codification had something to do with the proliferation of large-scale manufacturing in the United States and the resulting products liability litigation.\footnote{133} In order to keep pace with these national trends, Louisiana adopted a rule which essentially imputed knowledge of a product’s defects to the manufacturer for purposes of redhition, since the one who created the thing was logically in the best position to know of any defects in it.\footnote{134}

Despite these changes, however, modifications to redhition have been modest.\footnote{135} Such a dedication to longstanding legal institutions is a mark of the commitment to history and tradition embodied in all mixed jurisdictions.\footnote{136} In fact, aside from a handful of updating amendments, most of the articles on redhition in Louisiana are similar to those contained in the Louisiana Civil Code going back to 1870.\footnote{137}

\section*{B. The Common Law Doctrine: Warranty of Fitness}

In addition to the traditional civilian warranty against redhitory defects, a buyer may also sue his seller for a breach of the common law-based—and relatively new to Louisiana—warranty of fitness.\footnote{138} Under this warranty the seller has a general responsibility to ensure that the thing he sells is fit for its intended use.\footnote{139} Generally, the “intended” use means its ordinary and customary use.\footnote{140} However, if the seller has reason to know of the particular use of the thing by

\begin{itemize}
  \item \footnote{131} See id.
  \item \footnote{132} L.A. CIV. CODE art. 2545 cmt. b (2015).
  \item \footnote{133} Tooley-Knoblett, supra note 11, § 11:16.
  \item \footnote{134} For a discussion of the history of products liability in Louisiana, see William E. Crawford, Tort Law § 16:1, in 12 Louisiana Civil Law Treatise (2d ed. 2012).
  \item \footnote{135} See Bibe, supra note 103.
  \item \footnote{136} See Spurgeon, supra note 11, at 1230–37.
  \item \footnote{137} See id. at 1234.
  \item \footnote{138} See L.A. CIV. CODE art. 2524 (2015).
  \item \footnote{139} Id.
  \item \footnote{140} See Title, supra note 11, at § 10:63.
\end{itemize}
the buyer and such knowledge is accompanied by a reliance on the seller’s skill and expertise, then the seller is charged with the enhanced responsibility of ensuring that the thing the buyer receives meets those particular needs and uses. It is notable that, unlike the more narrowly drawn institute of redhibition, this warranty is very broad and expansive. It lacks the many limitations of redhibition, and the breach of the warranty of fitness falls under the more general rules for the breach of an obligation by a party as articulated in the Civil Code’s articles of conventional obligations (contracts).

1. History of the Doctrine

The inherent pull toward incorporating this common law concept was felt in Louisiana long before its eventual enactment into the Louisiana Civil Code. Although the warranty of fitness was not formally adopted until 1993, Louisiana courts had arguably made general allusions to the existence of the warranty of fitness in some form or fashion since the early 1900s. In the first case touching on the warranty of fitness, the Louisiana Supreme Court stated “we are only announcing a principle which no one denies when we state that the vendor, unless warranty is waived, warrants the thing sold as fit for the particular purpose for which it was bought.” Further, other cases appeared to suggest that the existence of the common law warranty of fitness was intertwined with redhibition’s precepts. Some courts suggested that the warranty was part and parcel of redhibition, while others tended to indirectly acknowledge that it was a separate warranty derived from the spirit of redhibition. For instance, the court in the 1972 case of Media Production Consultants, Inc. v. Mercedes-Benz of North America, Inc. tacitly acknowledged the existence of a general warranty of fitness, even though the actual UCC statute

142. See id.
143. See Bibe, supra note 103, at 138 (describing the open-ended remedies provided by the obligations articles of the Civil Code that are available to a plaintiff under a warranty of fitness claim).
144. See generally Fee v. Sentell, 28 So. 279 (La. 1900) (“We will not fall into the error of supposing that a secondhand machine can do the work of a new one, but it must be fit to do the work the contract shows was intended.”).
145. Id. at 282.
146. See LA. CIV. CODE art. 2524 cmt. a (2015).
would not be legislatively enacted until 21 years later. 148 In essence, the court was talking about the articles on redhibition, but utilizing different terminology and characteristics. 149 This off-handed use of language, some redhibition and some fitness, added even more confusion as to the existence and applicability of the warranty of fitness. 150

A few years later in 1974, the Louisiana Supreme Court would again suggest in two different cases that the warranty of fitness existed either apart from or in tandem with redhibition. 151 In the first case, Rey v. Cuccia, the court went through the traditional redhibition analysis, but then stated “[h]owever, if [the buyer] proves that the product purchased is not reasonably fit for its intended use, it is sufficient that he prove that the object is thus defective, without his being required to prove the exact or underlying cause for its malfunction.” 152 Later that same year, the court stated in Hob’s Refrigeration and Air Conditioning, Inc. v. Poche that “[i]n Louisiana sales, the seller is bound by an implied warranty that the thing sold is free of hidden defects and is reasonably fit for the product’s intended use.” 153 In neither case did the court make an ultimate and clear holding regarding the warranty’s independent existence, preferring instead to make general statements regarding intended use alongside traditional declarations about redhibition. 154 This mingling of the concepts suggests that the court was trying to use equitable theories—such as those which originally gave birth to the common law warranty of fitness—to expand the scope of redhibition, although it is arguable from the facts of each whether such an expansion would have even been necessary in order for the court to achieve the same results. 155

In Media Production, Rey, and Hob’s, the court was seemingly reaching outside the normal and narrow parameters of redhibition to incorporate broader principles of recovery—much akin to those available to courts at common law. 156 Initially, the common law

149. Id.
150. See id.
152. Rey, 298 So. 2d at 843.
153. Poche, 304 So. 2d at 327 (emphasis added).
154. Rey, 298 So. 2d 840; Poche, 304 So. 2d 326.
155. Rey, 298 So. 2d 840; Poche, 304 So. 2d 326.
156. Rey, 298 So. 2d 840; Poche, 304 So. 2d 326; Media Prod. Consultants, Inc. v. Mercedes-Benz of North America, Inc., 262 So. 2d 377 (La. 1972). Although courts in other states have the ability to exercise equitable powers in
did not recognize an implied warranty in the sale of property. However, in order to promote fairness and equity, courts gradually began to recognize certain warranties that were inherent in the sale of property. Specifically, in early common law, the rule of *caveat emptor* (buyer beware) reigned supreme but was gradually curtailed in the early 1800s by an action rooted in a hybrid of tort and contract. Unlike jurists in the civil law tradition, courts of equity at common law were at liberty to fashion remedies that departed from those explicitly set forth in legislation. Similarly, Louisiana courts dealing with the early concept of the warranty of fitness can also be characterized as trying to emulate their common law cousins by providing a broader array of remedies in the context of sales.

In order to fashion remedies when justice so dictates (a hallmark of the English common law), Louisiana courts—similar to their civilian cousins—are not courts of equity and are generally prohibited from engaging in such judicial rule-making outside the confines of legislation. *See* Bonneau v. Blalock, 484 So. 2d 275, 276 (La. Ct. App. 1988) (“The concept of equity as provided by Article 21 of the Louisiana Civil Code is not interchangeable with the concept of equity in common law jurisdictions. While we have no doubt imported some legal principles from the equity of common law jurisdictions as substantive law, we do not follow the peculiar procedural or adjectival concepts which go with that system known as equity in those states.”); Osborn v. City of Shreveport, 79 So. 542, 544–45 (La. 1918).

157. *See* Spurgeon, supra note 11.
158. *See id.*
159. *Id.* at 1232.
2. Louisiana’s Incorporation of the Doctrine

In 1993, the Louisiana Legislature expressly recognized the often confused and misidentified warranty of fitness by incorporating its codified version from the Uniform Commercial Code directly into the Louisiana Civil Code.\(^\text{162}\) To further add to its shiftless history, the new article was placed in the chapter on redhibition, and the accompanying comments disclaimed any connection to the early common law concept of the warranty of fitness—a concept that Louisiana courts had nonetheless been vaguely referring to since the early 1900s.\(^\text{163}\) The new article was simple and succinct. Rather than containing the intricate rules, requirements, and exclusive remedies available under redhibition, the new Louisiana Civil Code article 2524 was short and open-ended. If the warranty of fitness is breached, the remedies are those available under the general law of obligations (contracts), without limitation.\(^\text{164}\)

Unlike redhibition, with its narrow possibilities in the way of damages, reduction of the purchase price, or rescission of the sale, the new warranty of fitness left open the possibility of a varied bundle of remedies.\(^\text{165}\) In the comments to the article, the drafters explicitly noted that “[t]he Louisiana jurisprudence has recognized the existence of [the warranty of fitness] although, in most instances, it has been confused with the warranty against redhibitory vices.”\(^\text{166}\)

Although the Louisiana State Law Institute declared that the introduction of Louisiana Civil Code article 2524 did not change the law, the subsequent jurisprudence would suggest otherwise.\(^\text{167}\) Whereas before 1993 the warranty only existed in jurisprudence—as shown in *Media Consultants*, *Hob’s*, and *Rey*—as either a jurisprudential gloss on redhibition or as a casual independent statement of the court on the responsibilities of a seller,\(^\text{168}\) the

\(^{162}\) See Bibe, *supra* note 103, at 142. Under UCC Article 2, the warranty of fitness, as it is known in Louisiana, is actually comprised of two warranties: the warranty of merchantability (covering general fitness) and the warranty of fitness (covering particular-use fitness). See *id*. In Louisiana, both are simply known as the warranty of fitness and the substance in collapsed into one code article. See *La. Civ. Code* art. 2524 (2015).


\(^{165}\) See *id*.


\(^{167}\) See *id*.

enactment of the new article specifically codified the new
warranty.\textsuperscript{169} Taken in context, the introduction of the warranty of
fitness was part of a much larger “comprehensive revision of Civil
Code Articles on Sales.”\textsuperscript{170} The goal of this revision—so common
among legal reformers in mixed jurisdictions—was to update and
modernize the law of sales in Louisiana, which included the
adoption of some, but not nearly all, aspects of the nationally
prevalent Article 2 of the Uniform Commercial Code.\textsuperscript{171}

In general, the purpose of the UCC was to engender
standardization by creating a model, streamlined set of laws to govern
commercial transactions.\textsuperscript{172} Almost every state in the United States
has adopted Article 2, which deals with the sale of goods, except for
Louisiana.\textsuperscript{173} This was due in large part to the belief that the common
law concepts in Article 2 were incompatible with Louisiana’s larger
civil law scheme.\textsuperscript{174} Nonetheless, many provisions of Louisiana’s law
of sales were changed and select concepts from Article 2 were
introduced, including the warranty of fitness found in sections 2-314
and 2-315 of Article 2.\textsuperscript{175} Such, it can be argued, was the result of
Louisiana’s desire to enhance its commercial competitiveness by
enacting laws which are common to other states, while nonetheless
maintaining its unique legal institutions.\textsuperscript{176} However, in this
instance, and judging from the facts of the cases described above,
there is little reason to believe that the same results could not have

\textsuperscript{169} See Bibe, supra note 103, at 125.

\textsuperscript{170} See id. (citing to House Bill 106 as the source of the enactment).

\textsuperscript{171} See ESO\textsuperscript{172} PES D E S M O T I FS TO THE R E V I S I O N O F T H E L A W O F S A L E S (1995);
UCC § 2 (2010).


\textsuperscript{174} See Bibe, supra note 103, at 142.

\textsuperscript{175} Many scholars have noted that almost all efforts to promote uniform
laws have involved the cherry-picking of concepts from various legal traditions
to arrive at the final product. See, e.g., KARL N. LLEWELLYN & E. ADAMSON
HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE
JURISPRUDENCE (1967); Egon Guttman, U.C.C. D.O.A.: Le Roi Est Mort, Vive
Le Roi, 26 LOY. L.A. L. REV. 625 (1993); Gunther A. Weiss, The Enchantment
James Whitman, Commercial Law and the American Volk: A Note on Llewellyn’s
German Sources for the Uniform Commercial Code, 97 YALE L.J. 156 (1987).
flowed from merely utilizing redhibition, without making references to fitness. In this way, Louisiana law was not deficient such that the UCC’s version of the warranty of fitness was necessary in order to meet Louisiana’s commercial goals. Rather, it appears to have been gratuitously enacted as part of a larger, and perhaps somewhat blinded, desire to make the law of sales in this particular area look more like the laws of the UCC in other states. It is easy to see how similar motivations to align the law of a particular locale with prevailing common law concepts could be similarly present in the law reform process of other mixed jurisdictions.

C. Conflict Between the Two: Overlap and Confusion

What Louisiana has been left with are two warranties, extremely similar in purpose and applicability, but inherently different in structure and complexity. The incorporation of the warranty of fitness was part of an effort to update and enhance an area of the law that was otherwise viewed as outmoded and not in tune with the prevailing customs and practices of the commercial world. At the time, Louisiana’s law of sales represented a traditional stronghold of the civil law. But as an island in a sea of common law states, Louisiana determined that adopting more mainstream institutions would further the state’s economic goals.

Not eager to be completely submerged under the common law waters, Louisiana chose to moor itself to the ancient civil law institution of redhibition. Since redhibition had long been a part of Louisiana law, stretching back into French and Roman times, it had a strong and direct connection to Louisiana’s roots, and thus served as a natural object of the state’s affinity for maintaining its traditional and historical legal institutions.

In light of the common law’s gradual retreat from *caveat emptor*, one might say that redhibition was ahead of its time in that it provided an implied warranty before the common law’s hybrid tort and contract warranty principles began to arise, and certainly well ahead of the UCC’s warranty of fitness. Originally, the law of sales of personal property at common law adhered to the general principle that the “buyer should beware” in making his purchases,

177. See supra Part II.A and accompanying discussion.
178. See Bibe, supra note 103, at 138–44.
179. See generally id.
180. See id. at 126.
181. See generally id.
182. See id.
since any defects or problems with the object of his purchase
would be born solely by him.\textsuperscript{183} But over time the application of
this strict rule caused harsh results, and courts began to find an
equitable remedy through a combination of tort and contract
theories—thus giving birth to the first form of the warranty of
fitness.\textsuperscript{184}

Redhibition, on the other hand, has been around since early
Roman law in a much more sophisticated and direct fashion than
the judge-made contract-tort warranty at common law.\textsuperscript{185} Some
scholars, such as Professor James Gordley, have even suggested
that the precepts of many common law contract theories—of which
the warranty of fitness is one—were in fact originally taken from
the much more ancient and established civil law tradition—thereby
suggesting that redhibition actually inspired common law courts to
create the warranty of fitness.\textsuperscript{186} However, redhibition is structured
so as to balance the rights of the buyer and seller by providing
different rules to cover different transactions. But, whatever its
merits, the way in which redhibition was maintained alongside the
incorporation of the warranty of fitness serves as a major contributor
to the anchor effect in this mixed jurisdiction. Redhibition is meant
to protect the marketplace from corrupt sellers in certain narrowly
defined situations where the law deems the purchaser to be in such a
situation as to be unable to make an informed decision about his
purchase.\textsuperscript{187} The institution is narrowly defined so as to only
contemplate and provide a remedy for specific situations.\textsuperscript{188}

By the same token, redhibition seeks to balance the rights of the
parties by allowing the seller the opportunity to repair a defect if he, at
the time of the sale, did not know of it.\textsuperscript{189} Thus, the law of redhibition
does not seek to rescind or modify transactions indiscriminately, but
rather assumes that if the defect or vice were removed, the purchaser
would nonetheless still have purchased the thing.\textsuperscript{190} The virtue of this
mainstay of the civil law island is seen through its temperate and
balanced approach to private party conflict.

\textsuperscript{183} See Walton H. Hamilton, \textit{The Ancient Maxim Caveat Emptor}, 40 \textit{Yale
L.J.} 1133 (1931).

\textsuperscript{184} See id.

\textsuperscript{185} See \textit{Tooley-Koblett, supra} note 11, § 11:1.

\textsuperscript{186} See generally \textit{James Gordley, The Philosophical Origins of

\textsuperscript{187} Spurgeon, \textit{supra} note 11, at 1229–30.


On the other hand, the warranty of fitness is much broader. In redhibition, a good faith seller has the ability to repair, and, if he cannot, he must return the purchase price and any incidental expenses of the transactions. Only if the seller is in bad faith (i.e., knew of the defect at the time he sold it) do remedies for damages arise. Under the warranty of fitness, however, the possibilities are much wider. First, the concept of good or bad faith does not matter in such a definitive way. If there is a breach of the warranty, then the rules on conventional obligations automatically apply. Under these rules, damages are always a possibility, as is the dissolution of the sale. Hence, the power lies in the hands of the petitioning purchaser, rather than with an equitable and balanced statutory framework.

It is also noted that redhibition, in the case of bad faith sellers, also affords the opportunity to recover attorney’s fees, while the general rules on conventional obligations do not allow for such automatic recovery. The rationale for the difference in the rule seems unintelligible since the culpability of a bad faith seller in redhibition and a bad faith seller in the warranty of fitness would both seem to rise to the same or at least a substantially similar level of offense. Further, nothing in the Civil Code suggests that the two actions cannot be brought at the same time for the same sale. Thus, it is possible for an aggrieved purchaser to sue under both redhibition and the warranty of fitness. If the court finds that the thing was not defective at the time of the sale, the purchaser may still prevail by showing that it was not fit for its ordinary use. Still, if it can be proved that the seller knew of the purchaser’s specific need for the thing then the purchaser may prevail by showing that the thing was not fit for his particular need. Conversely, a good faith seller would benefit more by arguing that

192. See TITLE, supra note 11, § 10:84.
195. See id. It should be noted, however, that the Louisiana Law of Obligations also provides a general duty of good faith in contracts for all parties. See LA. CIV. CODE art. 1983 (2015); see also Gibbs Const. Co., v. Thomas, 500 So. 2d 764, 768 (La. 1987).
197. Bibe, supra note 103, at 140.
198. See id.
200. Bibe, supra note 103, at 139.
201. See id. at 138–41.
202. See id.
an action falls under redhibition so that he could have a chance to
repair the item and ultimately be held liable for a lesser amount. 204

Furthermore, a purchased thing can fail to meet the particular
purposes of the purchaser but still be fit for its ordinary use and not
afflicted with a hidden and latent defect. However, a thing with a
latent, hidden defect would generally be unfit for its ordinary
purpose and one would assume that the reverse would also be
ture—thus the confusion.

To out-of-state parties conducting business in the mixed
jurisdiction of Louisiana, this peculiar and confusing overlap can
be the cause of much consternation. Parties cannot be sure with
any certainty as to their exact responsibilities vis-à-vis each other.
This is made more difficult when trying to make a determination as
to the potential liability of a party seeking to make an investment
or conduct a series of purchases or sales in Louisiana. Moreover,
non-Louisiana parties may be surprised to learn that the warranty
of fitness also applies to immovable property; the warranty is
relegated to only movable property under the UCC. 205 From a
seller’s point of view, he must be careful not to evidence to the
purchaser that he knows of the purchaser’s particular intended use
of the property so as not to possibly trigger the heightened standard
under the warranty of fitness. 206

Recent cases reveal the continued difficulty that courts have
with the reconciliation of these related, but essentially differnet,
warranties. In the 2000 case of Badon v. RJR Nabisco, Inc., the
United States Court of Appeals for the Fifth Circuit had a chance
to ruminate on the warranty of fitness and its interaction with
redhibition through a claim for damages caused by cigarette
smoking. 207 The matter before the court was a procedural one, but,
in reaching the ultimate holding, the court meditated on what was
necessary to succeed in a cause of action under redhibition and
under the warranty of fitness when they were brought together. 208
In doing so, the court stated that the ability to prevail depended
upon:

1. whether the fact that smoking cigarettes has serious
   adverse health effects and is addictive constitutes a
   redhibitive defect in the cigarettes or a defect warranted
   against under article 2475; and
2. whether it is judicially known
   that at the relevant time there was such common knowledge

207. See Badon v. RJR Nabisco, Inc., 236 F.3d 282 (5th Cir. 2000).
208. See id. at 285.
of the adverse effects of cigarette smoking as to preclude such redhibition and article 2475 claims; and (3) whether the lack of privity between the Louisiana wholesalers and Badon precludes her redhibition and article 2475 claims against those wholesalers who were not, and did not with respect to consumers occupy the position of, manufacturers of the cigarettes.209

Here again—as seen in some cases prior to the official adoption of the warranty of fitness in 1993—the court declared that the warranties are separate and distinct, but then combined the two when analyzing their constituent parts.210

The first element calls into question whether cigarettes have an inherent defect or vice.211 This language leans more toward the redhibition analysis, because it fails to focus at all on the intended or ordinary use of cigarettes and whether these particular cigarettes in question could meet that use.212 The second element goes toward the knowledge of the courts at the time of such vices or defects.213 Strangely, this concept is out of place in the analysis under either of the warranties. It asks nothing of the ordinary or particular use of the thing with respect to the purchaser and, insofar as redhibition goes, it adds an extra-codal element in introducing the relevancy of whether it was the common knowledge of the courts at the time that cigarettes posed a health risk.214

Lastly, the relevancy of manufacturers (who are deemed to be in bad faith in redhibition) is grafted into the warranty of fitness analysis, even though Civil Code article 2524 does not provide for different rules for these types of parties.215 Through the lens of this court’s analysis, it is difficult to tell with any certainty what is actually taking place in the jurisprudence.216 On the one hand, it appears the court was viewing the warranty of fitness as a subpart or component of redhibition.217 On the other, the court may have been trying to expand the scope of what constitutes redhibition.218 It appears fairly clear that, at least in Badon, the court is certainly

209. See id.
210. Id. at 285–87.
211. Id. at 285.
212. See id.
213. Id.
214. See id.
215. Id.
216. See id.
217. Id.
218. See id.
not recognizing the warranty of fitness as an independent cause of action.\footnote{Id.}

Similarly, in the 2000 case of \textit{Cunard Line Ltd. Co. v. Datrex, Inc.}, a warranty claim arose over the proper prescriptive period for an action related to defective and incorrectly installed cruise ship lights.\footnote{Cunard Line Ltd. Co. v. Datrex, Inc., 926 So. 2d 109, 111 (La. Ct. App. 2006).} As in \textit{Badon}, the court in \textit{Cunard} recognized that redhibition and the warranty of fitness are two separate warranties.\footnote{Id. at 114 ("Thus, it appears that the legislature intended to separate and categorize three different types of warranties applicable to sales rather than to have all such warranties defaulted into the category of the warranty against redhibitory defects. Accordingly, we conclude that [Civil Code article 2524] applies to a situation in which the cause of action is based, not on the defective nature of the thing at issue, but on its fitness for ordinary use and/or for a particular use or purpose.").} The petitioner alleged that the lights were "unsuitable for ordinary use in a cruise ship" and that the plaintiff "did in fact rely upon DATREX’S skill, judgment and representations regarding the" selection and installation of the lights.\footnote{Id. at 113.} Alongside these allegations, the plaintiff also challenged the defective nature of the lights under redhibition.\footnote{Id.}

Strangely—and despite having made the proper allegations for a claim under the warranty of fitness—the court held that because the plaintiff’s “cause of action is based on the allegedly defective nature of the LLL systems, it is limited to the prescriptive period for redhibitory defects and may not avail itself of the ten-year prescriptive period for conventional obligations."\footnote{Id. at 114.} Here again the courts are struggling to sort through the two warranties and matching the facts to the requirements in a way that creates a coherent and reliable enforcement of rights.\footnote{See id.} However, in \textit{Datrex} the court did a better job of distinguishing between the two warranties by specifically recognizing that they were separate legal concepts with separate prescriptive rules, which the court in \textit{Badon} struggled with when it appeared to describe fitness as being subsumed by redhibition.\footnote{Id.}

In the most recent case on the warranty of fitness, the court in \textit{Fontenot v. Saxby} dealt with the sale of immovable property to an individual who was precluded from building a residence on a parcel because of a building restriction.\footnote{Fontenot v. Saxby, 34 So. 3d 477, 479 (La. Ct. App. 2010).} She sued her seller’s
predecessor-in-title who had originally subdivided the land, claiming breach of the seller’s warranty against redhibition and the warranty of fitness. The court held that any claims in redhibition were prescribed, but then, after reciting Louisiana Civil Code article 2425, stated that the plaintiff Fontenot:

[D]oes not allege in her petition or brief that she relied on any skill or judgment of Saxby in choosing this particular piece of property and therefore cannot claim that under this article the thing was not fit for its intended use. Accordingly, the record does not support that Fontenot is entitled to any review of her relief under the general rules of contract.

It is noticeable that the court pools together the general provisions of the warranty of fitness dealing with a thing’s ordinary use with the stipulations where its particular use comes into play. Under the court’s holding, one would think that if there is no reliance on the skill of the seller in order to support the selection of the property for the purchaser’s particular use, then there can be no claim for a warranty of fitness at all. This is clearly not the case under the plain words of the first part of Civil Code article 2524, which states “[t]he thing sold must be reasonably fit for its ordinary use.”

As seen through these recent cases, Louisiana’s anchoring to redhibition has resulted in the watering down of both the warranty of fitness and redhibition because both of their requirements and elements are often conflated, and, as a sign of its questionable viability, claims under the fitness warranty are rarely successful. The anchor effect, in the case of redhibition and fitness, has done equal harm to both institutions. Sometimes courts combine redhibition and the warranty of fitness; other times they appear to favor redhibition, having it subsume fitness; and still at other times they appear to expand redhibition using concepts from the warranty of fitness. In doing so, this mixed jurisdiction’s general law of warranty has been anchored down, both becoming less like the

228. Id. at 480.
229. Id. at 483 (citation omitted).
230. See id. at 481–82.
231. See id. at 483.
234. See supra Part II.
uniform laws of other states and contributing to a less competitive commercial environment.

III. ANCHORING THE LAW OF CONTRACTUAL FAIRNESS

One of the most well recognized principles of the common law is freedom of contract.235 This precept stands for the notion that private parties are generally free to enter into whatever agreements they deem necessary, appropriate, or desirable, just as long as they are not against public policy.236 At the heart of this concept is the idea that markets work best and commerce flourishes most when individuals are able to enter into private dealings without the heavy hand of government oversight or burdensome legal restrictions to weigh them down.237 Such freedom encourages innovation in business dealings, which in turn supports and encourages economic growth and prosperity.238

However, there are instances where public policy dictates that the benefits of certain agreements are outweighed by their negative consequences.239 Such examples include agreements that are illegal, immoral, or are unjust to disadvantaged or vulnerable parties.240 In these instances, the law seeks to limit the general liberties of contract by placing restraints or outright prohibitions on what may be agreed upon.241 This is particularly the case when the law seeks to protect a party that has unequal or little to no bargaining power in negotiations.242

Although mixed-jurisdiction judges in Louisiana have often declared that “[c]ourts are not created to relieve men of their bad bargains made,”243 the state’s law of conventional obligations

236. See Kennedy v. Durden, 116 So. 3d 12, 16 (La. Ct. App. 2013); see also id. at 17 (Brown, C.J., dissenting).
238. See generally John Tomasi, Free Market Fairness (2012).
239. See First Guar. Bank v. Baton Rouge Petroleum Ctr., Inc., 529 So. 2d 834, 842 (La. 1987) (“Rules of public order are those which an individual is expressly or impliedly prohibited from renouncing because they have been enacted for the protection of the public interest.”).
242. See id. at 243.
243. Lama v. Manale, 50 So. 2d 15, 16 (La. 1950).
(contracts) nonetheless endeavors, albeit in a narrow fashion, to strike a careful balance between freedom of contract and protecting against unjust agreements. This is seen best through the long-held civilian institution of lesion beyond moiety, which seeks to give recourse to a seller of corporeal immovable property (tangible real property) when the price paid is less than one-half the fair market value. Under this concept, the law places a bright-line limitation on the ability of private parties to determine the amount that ought to be paid for property.

Similarly, in some respects to lesion, since at least the 1920s, Louisiana has utilized a phantom version of the common law’s doctrine of unconscionability which seeks to curtail contracts where one of the parties to the agreement is determined to be overly vulnerable or lacks sufficient bargaining power. Although never specifically or formally incorporating the concept into Louisiana law, the state’s courts have nonetheless frequently used its precepts—under the guise of existing, legislatively created institutions—to undo or modify contracts that they determine to be unjust or inequitable.

As with redhibition and the warranty of fitness, both lesion and unconscionability seek to place rules on the freedoms of the marketplace in order to balance the equities and provide safety and protection to the unwitting buyer. Both institutions represent a sort of conflict between the citadels of the civil law and the clashing waters of the common law sea. However, one of the institutions is narrowly tailored and specific, while the other is broad and vague. Although unconscionability gives Louisiana courts wide latitude to police unjust agreements in whatever form they may take, lesion is limited in the type of harm and injustice it seeks to thwart.

Although such a limited remedy may have made sense in a more agrarian or less complex commercial economy, the intricate and

245. LA. CIV. CODE art. 2589 (2015); TITLE, supra note 11, § 10:15; TOOLEY-KNOBLETT, supra note 11, § 13:2.
247. See Hersbergen, supra note 244, at 1318.
248. Id. at 1411–12.
249. See supra Part II and accompanying discussion.
250. See generally Litvinoff, Vices of Consent, supra note 244, at 17; Hersbergen, supra note 244, at 1365.
sophisticated business and consumer world of today necessitates broader and more flexible remedies.\textsuperscript{252} For instance, lesion’s focus on the disparity of the price versus the value of the thing is only but one component of the much broader doctrine of unconscionability that extends to more general issues involving deception and unfairness. These additional instances of contractual injustice—all in the absence of legislative action—have been developed in a subtle way by Louisiana courts in order to meet the expectations of a changing society.\textsuperscript{253} However, despite this subconscious desire to expand such remedies, lesion, a mainstay of Louisiana’s civil law tradition, has remained unchanged.\textsuperscript{254} By anchoring itself to this rigid and limited institution, Louisiana law has been forced to morph in an intellectually insincere and unclear way in order to accommodate a changing consumer marketplace.\textsuperscript{255}

\textit{A. The Civil Law Doctrine: Lesion Beyond Moiety}

The right to invoke lesion beyond moiety arises from the Louisiana Civil Code’s pronouncement that the price paid for immovable property “must not be out of all proportion with the value of the thing sold.”\textsuperscript{256} Such a concept seeks to protect the seller who may be unsophisticated in his negotiations or who suffers at the hands of an exceedingly manipulative and cunning buyer.\textsuperscript{257} Further, it also seeks to protect the rights of the seller’s creditors who wish to safeguard against the seller divesting himself of his assets for consideration that is less than that which would otherwise be obtained in the fair and open market.\textsuperscript{258} As a further limitation, lesion is only available for corporeal immovable property (tangible real property), and nothing else.\textsuperscript{259}

The theory behind lesion comes from the idea that, in a true commutative contract, one gives up something of value in return for something of roughly equal value.\textsuperscript{260} The contract is no longer
thought of as equal when the amount received is less than one-half the value of the thing that is given up. In those cases involving the contract of sale, the law creates an unrebuttable presumption that the seller must have been in error in having given up the thing, because he would surely not have agreed to do so if he knew what comparatively little he was receiving in return. The law takes such a strong stance as to this presumption that—unlike with the warranties of condition—a party may not waive or otherwise do away with the action for lesion even if he does so expressly in writing. Even a seller who has renounced lesion and made such waiver a principal term of the sale can nevertheless still bring an action for lesion if the requirements are met. If a seller is successful under lesion he may seek to have the thing returned to him, and he must return the purchase price, or, in the alternative, the buyer will give the seller a supplement in an amount sufficient to bring the price up to the fair market value of the thing sold.

But the most striking and important aspect of lesion is its very limited scope. For instance, the only avenue that may be used to avoid an action for lesion would be to prove that the transaction was actually an onerous donation. In order to qualify for this classification, however, the transaction would have to meet the form and intent requirements for a valid donation. Further, the action must be brought within a one-year peremptive period from the date of the sale. Special additional rules apply to prevent the rescission of the sale for lesion when the buyer has subsequently sold the property to a third party, but even then some form of recourse is accorded to the seller. Various protections are also given to secured parties who obtain a security interest in the property prior to the action for lesion being exercised. Each rule

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261. See id.
262. TITLE, supra note 11, § 10:16; see also TOOLEY-KNOBLETT, supra note 11, §§ 13:1–13:5.
269. TOOLEY-KNOBLETT, supra note 11, § 13:15. See also TITLE, supra note 11, § 10:22.
270. TOOLEY-KNOBLETT, supra note 11, § 13:18. See also TITLE, supra note 11, § 10:23.
is specific and detailed and avoids extending any discretion to courts that might attempt to expand lesion’s limited scope.271

1. History of the Doctrine

Much like redhibition, lesion is long-standing on the civil law island.272 Although preceded by a more limited Roman law institution for protecting minors called *restitutio in integrum*, lesion beyond moiety first appeared in substantial form during the time of the early Christian Roman emperors.273 This early form of lesion, called *laesio enormis*, was meant to protect petty landowners who were often under harsh economic pressure during the later years of the empire to sell their lands to their wealthier, aristocratic neighbors.274 By preventing a sale that would yield to the improvident landowner less than half the value of his land, Roman law sought to afford protections and a balancing of the equities in these transactions.275

Later, as Christianity became more entrenched in early Europe, the idea behind lesion would permeate into the central tenets of Canon Law—which, among other things, demanded that a fair and reasonable return be given in every contract—and eventually began to pervade all forms of contract law.276 This great wave of Christian legal thinking made its way into other forms of transactions aside from merely those involving property.277 Contracts for services and interest on loans, as well as any other form of agreements whereby an excessive advantage was given to any one party were also included under lesion.278

Turning to early French law, because of the economic and political woes that were a hallmark of 17th and 18th century pre-
revolutionary France, litigation dealing with lesion was rampant in the French courts. This sparked a general fear that the institution was causing serious damage to and uncertainty in the stability of private transactions. Thus, during the tumultuous legal reforms brought about by the various post-revolutionary governments, lesion beyond moiety was eliminated in its entirety.

Finally, the Emperor Napoleon reintroduced the institution of lesion when he promulgated the French Code Civil. However, its breadth and substance were much diminished from its earlier canonical form. For instance, the action was made available only in cases of sales and partitions and restricted to only immovable property. At the time, this restricted application was supported by the notion that movable property had little value compared to that of land and that land, as a general rule, was subject to less variability in value. It was at this time that the institution was also limited to only the seller under the theory that only the person giving up the immovable could reasonably be susceptible to necessitous circumstances.

2. Louisiana’s Incorporation of the Doctrine

It was in this form, as articulated in the French Code Civil, that the institution of lesion beyond moiety was incorporated into Louisiana law and the law of most other mixed jurisdictions. Few changes—such as the time period for bringing an action and the circumstances governing when rescission, as opposed to supplementing the price, may be demanded—have been made to Louisiana’s law of lesion, and it remains largely the same as when it was originally enacted into the French Code Civil. Nonetheless, this preservation is consistent with Louisiana’s strong desire to uphold its traditional institutions, even to the point of allowing them to remain relatively unchanged for multiple centuries.

279. See Litvinoff, supra note 273.
281. See Litvinoff, Vices of Consent, supra note 244, at 109.
282. See Litvinoff, supra note 273, § 4.
283. See Litvinoff, Vices of Consent, supra note 244, at 109–10; Code Civil [C. civ.] arts. 877, 1674 (Fr.).
284. See Litvinoff, Vices of Consent, supra note 244, at 109–10.
285. See id.
286. Id.
287. See id.
288. See id.
With lesion, Louisiana courts have declined to augment the circumstances under which it may arise, even when the facts of a case might otherwise merit an equitable expansion of the concept. For instance, courts have rejected using lesion for the sale of incorporeals, regardless of the inadequacy of the price or the vulnerable position of the buyer, such as with the sale of rights of inheritance, obligations, and intellectual property.\(^{289}\) And, despite the development of markets for property other than real estate—as well as changing economic circumstances that might impact what is deemed a “fair” price—lesion has not been otherwise modified or expanded to take these changing expectations of a modern world into account.\(^{290}\)

One area that has been the source of particular trouble for Louisiana courts involves cases for lesion where the right at issue involves immovable property, but not purely corporeal immovable property. For instance, the sale of servitudes has been held to be outside the protections of lesion.\(^{291}\) On the other hand, in cases involving the transfer of mineral rights, courts have upheld the existence of the minerals as a valid component in computing the fair market value of the land being conveyed for purposes of determining whether the purchase price is lesionary.\(^{292}\)

Mineral rights are a form of incorporeal immovable under Louisiana law.\(^{293}\) Because of this, they are generally not subject to lesion, even when they are transferred for less than half their fair market value.\(^{294}\) This general rule is further stated in article 7 of the Louisiana Mineral Code, which declares that lesion is inapplicable to all “mineral transactions.”\(^{295}\) But the court in *Hornsby v. Slade* added a bit more nuance to this general proposition.\(^{296}\)

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\(^{293}\) See LA. CIV. CODE art. 470 (2015).


\(^{296}\) See Hornsby, 854 So. 2d at 445.
immovable property was sold for a certain price, but once it was in the hands of the purchaser, it was discovered that valuable minerals existed under the property. The seller brought an action to rescind the sale on the grounds of lesion, stating that the value of the minerals should go into the overall value calculation of the property. The court stated that while mineral rights are generally a form of incorporeal movables, until they are reduced to possession they are an integral part of the land. As such, their presence in conjunction with the immovable property is not an inconsequential factor in determining the fair market value of the land. The court specifically held that because mineral rights are component parts of the land itself that their value should be used for purposes of the “lesionary inquiry” when they are sold with the land.

In sum, lesion is largely unchanged since its earliest days in Louisiana. The rationale of the Romans and the French that initially dictated the rules and limitations of lesion have continued to govern its applicability, even when such rationale is arguably no longer valid.

B. The Common Law Doctrine: Unconscionability

But lesion is not alone in Louisiana’s arsenal of remedies to police unjust contracts. A separate but similar common law device has been transplanted in Louisiana law to assist in this endeavor as well. The doctrine of unconscionability can be traced back to early English law, which sought to provide prohibitions for certain contracts that “no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.” Since then, a multitude of American states have utilized this principle, and even the United States Supreme Court has referenced some form of the doctrine on occasion.

297. Id. at 442.
298. See id.
299. Id. at 445.
300. Id. at 445–46.
301. Id. at 446.
Courts have often declared that the power to police private contracts in this manner is part of the judiciary’s inherent and intrinsic powers, with no further authorization being necessary. Consequently, the power is not derived from legislation, but rather from general jurisprudential and constitutional principles that allow the judiciary to refuse to enforce unfair contracts or provisions that are deemed too burdensome, onerous, or one-sided.

1. History of the Doctrine

Although the doctrine was seldom used in its earliest period, as goods came into mass production and as the marketplace grew and became more complex, courts became more sensitive to commercial injustices and came to use the doctrine more frequently. This motivation was derived from the fear that certain individuals, because of their skill, profession, economic strength, stature, or association, were in a position to monopolize and exert undue control over consumers. Such abuse would impair and forever mar the common and ordinary understanding of fairness in arms-length transactions. As a result, courts began to view themselves as the natural protectors and mediators of the marketplace and began employing the doctrine in more frequent and robust ways. Certain contracts or clauses were deemed so offensive to societal notions of fairness and equity that they were held unconscionable and therefore unenforceable.

In order to validate the use of this equitable theory, courts couched their use of the doctrine as merely a manifestation of their ability to invalidate any agreement on the basis of a defect in consent. Since the agreement was so out of sorts with the natural interests of a particular party and so onerous and overreaching, no reasonable person would have knowingly agreed to it. Thus, the

305. Id.
309. See Hersbergen, supra note 244, at 1316–17.
310. Id. at 1317.
311. Id. at 1317–18.
312. Id.
party lacked the requisite legal consent, and the contract could be annulled.313

It should be noted that this type of judicial remedy making is a hallmark of the common law system—an occurrence that would, at least in theory, be loathed in the civil law. Common law chancery courts, going back to early English law, have always had the ability to confect equitable remedies that, although not specifically provided for by legislation, were justified because of fairness considerations.314 Civil law courts, however, have traditionally been restricted by design from creating such equitable remedies since the focus under the civilian system is solely on legislation and custom, rather than the exercise of independent judicial power.315 Mixed jurisdictions historically adhere to this civilian approach in defining the proper role of their judges as well.316

In the 1970s, when Article 2 of the UCC was first promulgated, a provision was included to finally codify the longstanding, judge-made doctrine of unconscionability.317 Section 2-302 makes a specific grant of power to courts to police contracts that are unconscionable.318 In doing so, it asks “whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”319 The comments to the article mention that this practice had been longstanding as a jurisprudential doctrine, but that now it was being placed into statute and legislatively sanctioned.320 Most UCC scholars attribute this endorsement as being part of a larger response to the fact that standard-form contracts—so notorious for their unevenness and overreaching

313. See id.


317. Brown, supra note 304.

318. Id.


320. See Hersbergen, supra note 244; UCC § 2-302 cmt. 1 (2013).
provisions—had become so prolific as to constitute the majority of all agreements entered into by private persons in the United States.321 By putting the doctrine into statute, the drafters hoped to lend some clarity, consistency, and stability to the otherwise unwieldy and inconsistently (if not intellectually dishonestly) applied doctrine.322

As of this writing, forty-eight American states have adopted Section 2-302, with Louisiana and California being the only two that have chosen not to incorporate the doctrine through legislation.323 However, since Section 2-302 contains so few specific directives on how the unconscionability analysis should be applied, many courts have adopted the two-part analysis that was first developed by the noted American contract law scholar Professor Arthur Allen Leff.324

The first prong of Professor Leff’s test requires courts to analyze the procedural aspects of the bargain, such as evidence of oppression, lack of meaningful choice, an inability to read or understand, lack of education, and a weak socio-economic status.325 The second prong looks to the substantive aspects of the contract such as the commercial reasonableness of the terms and provisions of the contract itself, the allocation of risks, fair remedy and penalty clauses, and an equitable cost-price balance.326 Nonetheless, courts have been varied as to how the prongs should be used, with some requiring evidence of violations of both procedural and substantive aspects, while others adopting a sliding scale approach whereby more of one aspect can make up for a lack of quantity in the other.327 The difficulty that common law courts have had with fashioning an effective framework from which to analyze unconscionability has been an issue that has plagued Louisiana courts as well in their application of the doctrine.

2. Louisiana’s Incorporation of the Doctrine

Although not having adopted Section 2-302—or any meaningful amount of UCC Article 2 for that matter—Louisiana is no stranger to unconscionability.328 The substance of the doctrine has been variously employed by the judges of this mixed jurisdiction to police contracts that they deem unfair or unjust even

321. See Lonegrass, supra note 308.
323. Lonegrass, supra note 308.
324. Id. See also Leff, supra note 306.
326. Id. at 16–17.
327. Id. at 17–18.
though it was never specifically enacted into the Civil Code or directly called as such by courts. This is chiefly done—much like common law courts prior to codification—through utilizing other existing concepts and institutions found in the Civil Code as a mask for what is ultimately an exercise of the doctrine of unconscionability. The first case to touch upon the concept was the 1890 Louisiana Supreme Court decision in *Lazarus v. McGuirk* where the court held that:

[A] judgment will be annulled when a party, having good defenses to an action, is prevented from urging them by the acts, promises, and representations of his adversary, in which he trusted, and by reason thereof a judgment has been rendered, which it is against good conscience to execute.

In *Lazarus*, the court discussed, in brief, its inherent constitutional powers to regulate and control the way in which it administered judgments. In making these declarations, the court introduced the idea, through the lens of fraud, that certain judgments could be denied or voided because of unconscionable behavior by the parties. This early version of unconscionability was later expanded to include judgments granted under unconscionable circumstances involving rights in a succession.

Over time, Louisiana courts have become somewhat more direct in wielding (or threatening to wield) the doctrine of unconscionability in those situations where a clause or agreement is deemed too harsh or oppressive. For instance, in the case of *Dennis Miller Pest Controls, Inc. v. Wells*, the court discussed the possibility of a liquidated damages clause being “so exorbitant as to be unconscionable and

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328. See Hersbergen, *supra* note 244, at 1318–19.
329. It should be noted that there is one specific place in Louisiana law where unconscionability is specifically sanctioned. The Louisiana Consumer Credit Law actually specifically endorses the use of unconscionability in circumstances involving consumer credit transactions. See *La. Rev. Stat. § 9:3551* (2009).
331. *Id.*
332. See *Succession of Gilmore*, 102 So. 94, 95 (La. 1924) (“The courts of this state will not hesitate to afford relief against judgments, irrespective of any issue of inattention or neglect, when the circumstances under which the judgment is rendered show the deprivation of legal rights of the litigant who seeks relief, and when the enforcement of the judgment would be unconscientious and inequitable. Our courts will follow the general principles of equity jurisprudence applied by the equity courts of the other states of this country in actions of this character.”) (emphasis added)).
will not, for equitable consideration, be invoked.”

In an even more direct decision, the intermediate appellate court in *McKelvy v. Milford* declared a provision in a real estate listing agreement—which provided that the realtor was entitled to her commission upon the signing of a purchase agreement with a buyer, regardless of whether the property was actually sold—to be “unconscionable.”

In an effort to validate its exercise of such non-legislative power, the *McKelvy* court cited a now-repealed Louisiana Civil Code article that was based on Christian doctrine. The article proclaimed that the quintessential rules of interpretation of contracts in Louisiana were “founded in the Christian principle not to do unto others that which we would not wish others should do unto us; and on the moral maxim of the law that no one ought to enrich himself at the expense of another.”

Still, at other times Louisiana courts have been more subtle in their endorsement of unconscionability and have only mentioned their ability to police private agreements in passing dicta. For example, the court in *Standard Accident Ins. Co. v. Fell* discussed the potential, but did not make a determination, for voiding a provision in a fidelity bond contract whereby the insured party was prohibited from challenging the bonding party’s sole determination regarding whether an indemnity payment was due. Also, in *Roberson v. C.W. Maris* and *J.H. Jenkins Contractors, Inc. v. City of Denham Springs*, the courts discussed, but did not render a judgment on, the notion that vague or overly broad provisions in a construction or building contract could be deemed unconscionable and therefore unenforceable.

Although some might argue that the policing of contracts by Louisiana courts is merely born from general civil law concepts of good faith and meaningful consent, or that other doctrines such as estoppel were really the tools at play, the language used by the Louisiana courts in making these determinations seems much more reminiscent of unconscionability. The phraseology of declaring

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335. Id.
336. Id. at 373 (citing former Louisiana Civil Code article 1965).
340. See generally supra Part II.B and accompanying discussion.
that a provision is “unconscionable” is not a term that has roots in the civil law. 341 However, it is an expression that has meaning and a significant history at common law. 342 This is particularly true given the use of the phrase in connection with statements about overreaching and undue power between private parties. Thus, it is logical to conclude that its presence in Louisiana law could, therefore, have derived from the common law. 343 In many ways, Louisiana courts are actually tracking the nomenclature of their common law cousins in this regard. 344 And in fact, the subtle incorporation of the doctrine of unconscionability into Louisiana jurisprudence is emblematic of the broader subconscious desire of this mixed jurisdiction to incorporate legal concepts that are more in line with the laws of the common law jurisdictions that surround it. 345 As individuals in other states have come to expect and presume the ability of courts to police oppressive or unjust contracts, Louisiana courts have dipped into the common law waters and grafted such concepts—even if through seemingly disingenuous ways—so as not to be viewed as out of step with modern legal expectations.

C. Conflict Between the Two: Obsolescence and Opacity

Both lesion beyond moiety and unconscionability seek to right wrongs and provide fairness between the parties where the court deems that one party has been taken advantage of or has unduly induced another to agree to something that a reasonable man would not. 346 In each case, the law seeks to step around and over the plain words of the agreement and instill a certain level of extra-party justice into the transaction. 347

However, as noted above, these two doctrines are extremely different. 348 Unconscionability is broad in scope and category and seeks to capture a seemingly endless array of circumstances and

341. See supra Part II.B.
342. See supra Part II.B.
343. See supra Part II.B.
346. See TITLE, supra note 11, § 10:15.
348. See supra Part II.A–B and accompanying discussion.
agreements under which a party may be subject to the heavy hand or undue manipulation of a party whose bargaining power is superior.\textsuperscript{349} Also, courts have wide latitude in utilizing their powers under this doctrine because it lacks definite boundaries.\textsuperscript{350} For most of its history, unconscionability has been viewed as an inherent power, vested in courts under constitutional and fundamental legal principles.\textsuperscript{351} Without a formal written structure to cage the judicial analysis, the possibilities for unconscionability’s use are endless.\textsuperscript{352}

And even with the advent of UCC Section 2-302 courts are still left with great discretion as to when and how they may use the concept to void or modify agreements.\textsuperscript{353} Since Section 2-302 contains so little guidance on the specifics of how the rule should be implemented, many have argued that it merely enshrined into law the general and broad principle that courts had already been employing for centuries.\textsuperscript{354}

Lesion, on the other hand, is a narrow and more limited device.\textsuperscript{355} It too seeks to nominally protect the weak against the heavy hand of the strong, but does so in a more restricted way.\textsuperscript{356} First, lesion is only available for sales of corporeal immovable property.\textsuperscript{357} The sale of movable property, however valuable or numerous, may not be rescinded for lesion, no matter how out of proportion the price is compared to the value.\textsuperscript{358} This limitation is rooted in the civil law’s historical views of real property being the chief indicator of wealth.\textsuperscript{359} But this rationale also has its flaws.\textsuperscript{360} Today, movable property in the form of stocks, bonds, and other financial instruments—not to mention the ever-growing realm of virtual property such as social media accounts, mailing lists, and other noncorporeal rights—are considered to have immense

\textsuperscript{349}. See \textit{supra} Part II.B and accompanying discussion.
\textsuperscript{350}. See \textit{supra} Part II.B and accompanying discussion.
\textsuperscript{351}. See \textit{supra} Part II.B and accompanying discussion.
\textsuperscript{352}. See \textit{generally supra} Part II.B and accompanying discussion.
\textsuperscript{353}. Lonegrass, \textit{supra} note 308, at 60.
\textsuperscript{354}. Id.
\textsuperscript{355}. See \textit{supra} Part II.A and accompanying discussion.
\textsuperscript{356}. See \textit{supra} Part II.A and accompanying discussion.
\textsuperscript{357}. See \textit{supra} Part II.A and accompanying discussion.
\textsuperscript{358}. See \textit{supra} Part II.A and accompanying discussion.
\textsuperscript{359}. See Odinet, \textit{supra} note 80, at 1377.
value. Further, lesion presupposes that meaningful manipulation goes in only one direction—only the seller can invoke the right. A buyer who is under undue pressure or is being oppressed or manipulated by the seller to purchase property for a price that is out of proportion to its value is without recourse. Despite changes in modern life and views on different forms of property, Louisiana law has not modified lesion to account for these changing expectations.

The reason for the existence of these two similar but inconsistent doctrines derives from the inherent struggle behind the anchor effect. Louisiana has refused to adopt Article 2 of the UCC because it was deemed to be too out of step and incompatible with the state’s civil law scheme. And part of that involved maintaining the ancient institution of lesion, which traces its roots back to French and Roman law. To lose lesion would be to lose a legal concept that has existed in Louisiana since its earliest days. Such a loss would be repugnant to the mixed jurisdictional sense of identity and tradition, even if its maintenance has ceased to serve a useful purpose. But in that vein, Louisiana was not willing to change and modify lesion to make it more in line with unconscionability or to expand its scope to encompass a wider array of scenarios and types of transactions. And this is true despite the fact that many civilian jurisdictions such as Switzerland, Austria, Germany, and particularly Quebec have done so.

As the economy has become more regional and national in scale and scope, the common law waves have come crashing hard on the shores of the Louisiana civil law island. The expectations of the everyday man presupposes that if an agreement is so harsh and unjust, and his position is so weak—because of education,

362. See supra Part II.A.
363. Id.
364. See id.
366. See supra Part II.A.
367. See supra Part II.A.
368. Some civil law countries have amended their version of lesion to broaden its scope. For example, the Austrian Civil Code allows rescission for the sale of movables as well. ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] 934 (Austria); see also Civil Code of Québec, S.Q. 1991, c. 64 art. 1406 (Can.); CODE DES OBLIGATIONS [CO] [CODE OF OBLIGATIONS] Mar. 30, 1911, art. 21 (Switz); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BUNDESGESETZBLATT, § 138, para. 2 (Ger.); CODICE CIVILE [C.C.] art. 1448 (It.).
369. See supra Part II.B.
status, position, or wealth—so as to render him wholly incapable of meaningfully and knowingly entering into the agreement, that a court may employ powers of equity and justice to remediate unjust enforcement.370

This is particularly true since the 2007–2008 economic crisis and the advent of stronger consumer protection laws,371 both at the state and federal level in the United States and abroad, which have brought the concept of fairness and equity in private agreements (particularly in standard form agreements) into the limelight of political discourse.372 Over time and in the face of such expectations, Louisiana courts have had no choice but to splice the common law, UCC concept of unconscionability into state law in such a way as to avoid a wholesale adoption—which would offend civilian principles—but still enable enforcement and tacit recognition of the doctrine.373 Unfortunately, its disguised implementation has logically drowned out the need for lesion and, because of unconscionability’s wide scope, the doctrine has washed away some of the historical gilt that has characterized lesion, thus revealing its many limitations and weaknesses in the modern world.

Under these circumstances, the result has been Louisiana’s maintenance of an institution that is out of step with modern life and the economic and social realities of the day.374 It has further occasioned the judicial embracing of a concept that the state’s legislature has heretofore refused to adopt in order to further the state’s ability to compete in the integrated, cross-border economy.375 However, both concepts at their core seek to accomplish the same goal, but one is so steeped in history and tradition that it fails to face the realities of a changing world, while the other is so broad and unmanageable that it causes uncertainty.376 By not specifically recognizing unconscionability, Louisiana jurisprudence on the issue is left in disorder and lacks coherent and consistent parameters, which in turn makes the realm of possibilities for its application both endless and unpredictable.377

370. Lonegrass, supra note 308.
373. See supra Part II.B.
374. See supra Part II.A.
375. See supra Part II.B.
376. See supra Part II.A.
377. See supra Part II.B.
Thus results the anchor effect in Louisiana contract law. With redhibition and fitness, the anchor effect has resulted in two institutions that overlap and become conflated with one another to such a degree that both lose much of their potency. But with lesion and unconscionability, the anchoring effect has resulted in the existence of two separate institutions with the same goals, but with wholly different and inconsistent approaches. Until this disjointed legal arrangement is recognized and corrected, each of these concepts will continue to exist in an effort to provide justice and fairness in contracting, but neither doing so in an efficient or truly effective way.

IV. THE ANCHOR EFFECT IN CONTEXT: A SOCIAL SCIENCE PERSPECTIVE

As described above, the anchor effect is caused by the retaining of existing civil law institutions alongside the incorporation of new common law concepts, and this has resulted in an array of negative consequences to Louisiana’s bijural legal regime. In seeking to further understand the causes behind the anchor effect, after having explored its various instances, it is important to consider the psychology of what underpins Louisiana’s intrinsic inclination to cling somewhat inflexibly to established civil law institutions when engaging in legal reform. By understanding this psychology, one is able to understand the unique and particular social science nuances that motivate legal reform in all mixed jurisdictions.

This anchoring is rooted in more than a sheer appreciation for history or an aversion to change. Both assertions are too simplistic and suggest that the anchor effect is caused merely by a casual affinity for the familiar and the known. In fact, social scientists have long argued against the overly basic yet widely held truism that people generally resist change. This statement has been described as being overly one-dimensional in that it fails to recognize the many situations in which change is welcomed and even embraced. For instance, people rarely ever resist an increase in pay, the chance to work on a project which they find stimulating, or an increase in the amount of resources or tools

378. See supra Part I.
379. See supra Part II.
380. See supra Part II and accompanying discussion.
381. See supra Parts III–IV.
383. See id.
available to accomplish a given task. 384 All of these involve a
change, but few—if any—individuals are opposed to them. 385 A
more complex understanding of society’s resistance to change, as
well as how tradition and history play a part in decision-making
processes, is essential to giving full consideration to the deep-
rooted psychology and sociology of how the anchor effect has
come to exist and operate in America’s sole mixed jurisdiction
and, by extension, in all mixed jurisdictions. 386

A. Self-Preservation and the Resistance to Change

Of fundamental importance to understanding why the legal
reforms described above have been subject to such subconscious
resistance, one must understand what lies behind this struggle. 387 In
the context of the anchor effect it is necessary to look at what
specific factors underlie efforts to maintain existing civil law
institutions even in the face of incorporating new and/or conflicting
legal devices. 388

Social science literature gives some insight into this inquiry.
First, in general, change threatens the status quo. 389 In Louisiana,
like all mixed jurisdictions, the civil law system of private law has
existed for hundreds of years and is both widely familiar and
known to the state’s inhabitants. 390 Accordingly, there is a natural
inclination to maintain the current state of affairs because such
familiarity brings with it the ability to confidently and comfortably
navigate the legal system. 391 After a given community first
becomes comfortable with a scheme of laws, the emphasis subtly
shifts to keeping those laws in place so as to ensure stability and
permanence. 392

Additionally, change is further resisted because it calls into
question self-confidence and one’s personal ability to perform. 393
As generations of Louisiana lawyers and jurists have gained and
honored their skills under the existing civil law system, the

384. See id.
385. Id.
387. See Bruckman, supra note 382, at 211–19.
388. See supra Parts I–III.
389. See Bruckman, supra note 382, at 211–19.
390. See supra Parts I–III.
391. See Bruckman, supra note 382, at 211–19.
392. Id.
393. Id.
incorporation of an entirely new structure and the abandonment of
the old calls into question continued viability. As the adage goes,
“can you teach an old dog new tricks”?394 Can, or will, parties who
are so intimately familiar and content with a given scheme become
successfully acclimated to an entirely new structure? Thus, a
psychological element of self-preservation pervades the legal
reforms described above because the incorporation of new
concepts necessarily requires the need to learn and become
proficient in new rules and procedures.395 As new legal devices are
incorporated from the common law and other uniform law sources,
a natural tension is created between feelings of familiarity and
anxiety about learning new rules.396

Further, change is resisted because, at a fundamental level, it
calls into question how a given group understands and makes sense
of the world.397 The structures that a society builds around it—
including its legal system—reflect a given set of values and
norms.398 They are honed over time to be an extension of the
culture, principles, and attitudes of the place.399 Louisiana’s civil
law structure can be said to follow this same theory. Legal reform
of this system, however necessary, brings about a tacit
acknowledgement that things can be done a better way or that the
current set of rules are inadequate.400

Although some reforms may bring about only small or singular
changes in a given institution, it is the psychology of that change
rather than the substance that can trigger a need for self-
justification and defensive reasoning.401 It is also true that within
the decision-making body there may be distrust among the
members as to those leaders championing the reform—as seen
through the introduction of the common law by the congressionally
appointed governor William Claiborne in Louisiana’s early days of
statehood.402 This mistrust can stem from a different understanding
or assessment of the circumstances calling for the reform, as well

394. Although of unknown origins, the proverb is widely used. See Joseph F.
Falcone III & Daniel Utain, You Can Teach an Old Dog New Tricks: The
Application of Common Law in Present-Day Environmental Disputes, 11 VILL.
ENVTL. L.J. 59 (2000); Celia R. Taylor, Capital Market Development in the
Emerging Markets: Time to Teach an Old Dog Some New Tricks, 45 AM. J.
395. See Bruckman, supra note 382.
396. See supra Parts I–III.
397. See Bruckman, supra note 382.
398. See id.
399. See id. (citing SUZANNE SAMUELS, LAW, POLITICS, AND SOCIETY (2005)).
400. See Bruckman, supra note 382.
401. See generally id. at 212.
402. See id.
as an innate desire to defend established social relations that are perceived as being under threat.\textsuperscript{403} Lastly, groups associate change with stress.\textsuperscript{404} This stress impacts not only personal feelings and emotions, but also organizational behaviors.\textsuperscript{405} As an existing institution gives way to another, subconscious feelings of anxiety are sparked, as there becomes a need to understand and assimilate oneself to a new order.\textsuperscript{406}

\textbf{B. History and Tradition in Decision-Making}

However, it is not enough to simply acknowledge that certain changes cause anxiety, fear, stress, and other attendant ills.\textsuperscript{407} The anchor effect is caused by more than just the methodical, everyday symptoms that come with change.\textsuperscript{408} Rather, it is the distinct and palpable force of tradition and history that makes this mixed jurisdiction’s struggle with legal reform all the more tumultuous.\textsuperscript{409} Specifically, fidelity to the state’s legal history and tradition is what makes the clash against legal change and reform so arduous.\textsuperscript{410}

In general, the literature often describes tradition as being “equated with manners and morals of our past, with our origins (genesis) and roots, and with our explanation of the present moment as a continuum of historical forces through time.”\textsuperscript{411} Louisiana’s civil law tradition very much follows this characterization.\textsuperscript{412} Because it chiefly represents the area of the law that governs the rights, duties, and obligations of private parties, it, in essence, symbolizes feelings about social interaction and interrelational obligations.\textsuperscript{413} The morals of the family, the rights of the consumer, the stability of transactions, and the safeguard of property are all intimately derived from Louisiana’s ancient civil law tradition.\textsuperscript{414}

\footnotesize{\textsuperscript{403} See id.  \\
\textsuperscript{404} See id. at 213.  \\
\textsuperscript{405} See id.  \\
\textsuperscript{406} Id.  \\
\textsuperscript{407} See supra Part VI.A.  \\
\textsuperscript{408} See supra Parts I–III.  \\
\textsuperscript{409} See supra Parts I–III.  \\
\textsuperscript{410} See supra INTRODUCTION and accompanying discussion.  \\
\textsuperscript{412} See generally THOMAS J. SEMMES, HISTORY OF THE LAWS OF LOUISIANA AND OF THE CIVIL LAW (2010).  \\
\textsuperscript{413} See id.  \\
\textsuperscript{414} See generally Roger K. Ward, Bijuralism as an Assimilation Tool: Lord Durham’s Assessment of the Louisiana Legal System, 63 LA. L. REV. 1127 (2003).}
Not only this, but because of its long-standing and historical nature, this legal system links many Louisianans to their ancestry, conjuring up images of immigrants, pioneers, and early settlers and the laws and traditions that governed and protected them over the course of many generations.415

And, rightly so, tradition should be protected and preserved. The wide-scale demand for mass-market uniformity—particularly in the quest to enact uniform laws—can often serve as a death knell to distinctive legal institutions that are not only historically significant, but also fulfill unique needs and purposes that are idiosyncratically tied to people and place.416 Mixed jurisdictions are often described as melting pots, brimming with cultures and value systems that are drawn over many centuries and from across different regions.417 In the case of Louisiana, this “multiculturalism supports the preservation of differences among people of diverse cultures rather than urging them to replace their [i]dentities with one single ‘American’ identity.”418 Similarly, the history and background of such mixed jurisdictions are also worthy of preservation because of the way in which they have helped to define many features of the state and its people.

And, as might be expected, tradition, being of such chief societal importance, plays a powerful role in decision-making.419 Groups chart their future through the “shared recognition of local character and tradition,” and these elements help shape subsequent decisions about that future.420 This form of mutual recognition has been shown to have a heavy influence on law and policy-making such as, for example, how local culture has dictated decisions on land-use, zoning, and development decisions.421 Such is the case with Louisiana’s efforts at legal reform discussed above. Although there is often a strong desire to harmonize the law with other jurisdictions and create a legal environment that is both competitive and mainstream, decision-making regarding how this is accomplished is very much tied to feelings of tradition and the preservation of

416. See Rath, supra note 411, at 25.
420. See id.
421. See id.
It is through an honest recognition that a collective selfhood of the past is being incorporated into the decision-making of the present that Louisiana’s decision makers and the decision makers in other mixed jurisdictions are able to address the causes and negative consequences of the anchor effect.

C. Forging a Usable Past

These many elements that contribute to society’s resistance to change, as well as the effects of Louisiana’s strong attachment to its legal history and tradition, are exemplified in the anchor effect. There is a subconscious policy choice made during the legal reform process that existing institutions—which are symbolic of established and existing social structures and long-held self-identifying traditions—should be maintained to help temper and blunt the perceived harshness, anxiety, and stress that comes with change. Social science research expounds on this very point: that “[p]eople make choices, self-consciously or not” that are “outgrowths of the psychic underbrush” and such choices are shaped by the historical forces of “shared experiences or [the] background knowledge of participants.”

As described in this Article, the choices that are involved in engaging in legal reform—whether by the legislature or the courts—so deeply informed by history and tradition, can sometimes lead to negative consequences, but such consequences are made more difficult to acknowledge because of the powerful and subconscious sociological desire to resist that change. This emphasizes the need for legal reformers in mixed jurisdictions—which have such a unique and historical tie to their own laws and legal institutions—to be frank and self-conscious in acknowledging the historical legal culture of the place when enacting reforms so that these traditions can be clearly managed and built upon to create a foundation for a new set of priorities and values. Mixed jurisdictions, like all societies, are charged with forging a “usable past” that stands not as a barrier to change and reform, but as an impetus for frequent self-examination. In the context of the anchor effect, the use of tradition through the lens of self-reflection ensures that mixed
jurisdictions avoid being trapped in the patterns of their past and, rather, engage in the creative endeavor of creating new institutions and adjusting the old so as to meet the needs of the present.\textsuperscript{427}

\section*{Conclusion}

Change is inevitable. It is needed to bring progress, to develop, to grow, and to advance. Change also brings the unforeseen, the uncertain, and the untested. Change is particularly difficult because it inherently means that something must be left behind to make room for something new. And most of all, a wise discernment is required to determine when change is unnecessary.

Mixed jurisdictions are exceptionally susceptible to this internal struggle that comes with change because of their unique status as civil law states or countries that are surrounded by other jurisdictions or systems that are dominated by the common law.\textsuperscript{428} For Louisiana, this dichotomy is the source of a host of issues. Having to learn or adjust to a new system and a new set of rules when doing business or operating in Louisiana, as opposed to any other state, can cause frustration, confusion, or, at worst, a complete rejection of engaging with the state altogether. In a time when competition between states for economic development projects, business investments, and highly skilled jobs and professionals is greater than ever, the potential for such a negative perception or complete rejection has garnered significant attention from Louisiana’s leaders.\textsuperscript{429}

In an effort to keep pace with its neighbors and to diminish the image of a state where “things are done differently,” Louisiana has incorporated mainstream and national legal concepts into its law.\textsuperscript{430} These have come either through judicial adoption or through direct legislation.\textsuperscript{431} They involve embracing either concepts directly from common law cases or borrowing from institutions that have been created through national efforts to

\textsuperscript{427}. See id.
\textsuperscript{428}. See Palmer, supra note 15, at 7.
\textsuperscript{429}. For a discussion of state legal competition, see Lucian Arye Bebchuk, Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law, 105 Harv. L. Rev. 1435, 1443–1510 (1992).
\textsuperscript{431}. See supra Parts I–III.
implement uniform laws. \textsuperscript{432} Nonetheless, these foreign institutions are often fastened to the state’s legal landscape even when the horizon is already populated with existing institutions that purport to cover the same topic. \textsuperscript{433} These existing institutions are derived from Louisiana’s long-standing civil law tradition. \textsuperscript{434} This civilian tradition, so prized and favored, holds a special, almost sacred, place among Louisiana’s legal community. \textsuperscript{435} To jettison these altogether would be a betrayal of the past and an abdication of a responsibility that has been passed down in the legal community of this mixed jurisdiction since the days of James Brown, Louis Moreau Lislet, and the drafters of the 1806 manifesto during Louisiana’s early years of statehood. \textsuperscript{436}

Yet, what has resulted from this dual system of laws is an anchoring effect. \textsuperscript{437} A phenomena whereby incorporating new and foreign legal concepts into the law in an effort to become more competitive and mainstream, while at the same time maintaining longstanding and traditional civil law institutions—with both covering approximately the same subject matter or area—Louisiana law has actually become less progressive, less competitive, and less true to its roots. \textsuperscript{438} And of this dual system so created, the laws governing sale warranties and contractual fairness provide particularly potent examples of the negative consequences that can result.

The time has come for Louisiana, and perhaps, by extension, other similarly situated mixed jurisdictions, to acknowledge and understand the anchor effect and its negative consequences. By mooring the law to historical institutions that no longer serve contemporary needs, competitive desires are frustrated. \textsuperscript{439} Similarly, by incorporating new common law or uniform law concepts, but not adopting them fully or by introducing them but keeping similar and/or conflicting civil law institutions in place, the law as a whole

\textsuperscript{432} See supra Parts I–III.
\textsuperscript{433} See supra Parts I–III.
\textsuperscript{434} See supra Parts I–III.
\textsuperscript{435} See supra Parts I–III.
\textsuperscript{437} See supra Parts I–III.
\textsuperscript{438} See supra Parts I–III.
\textsuperscript{439} See supra Parts I–III.
becomes less clear and a proper analysis of these institutions can become confusing or impossible.440

A respect and reverence for history and tradition is essential.441 The civil law aspects of all mixed jurisdictions are important and should be protected and preserved. As such, there are many instances where an existing civil law institution is superior to and far more effective than a mainstream or popular uniform or common law concept. A part of respecting and preserving traditional legal institutions involves acknowledging when they prove to be superior to competing frameworks. When such is the case, the existing institution should be maintained and honed, rather than abdicated in favor of what is new or fashionable. Neglecting to act in such a manner by being clear, thoughtful, and honest when engaging in legal reform serves only to further isolate mixed jurisdictions on their civil law islands.442

In the event lawmakers of mixed jurisdictions feel it is in their jurisdiction’s best interest to wade into the common law waters, they must do so with confidence and they must be deliberate in their steps.443 Each foreign legal concept that is adopted must be carefully and honestly evaluated to determine whether it meets the needs and goals of the locale.444 This analysis must be accompanied by a candid appraisal of any current civil law institutions that could conflict with, serve the same goals as, or occupy the same area as the new concept.445 If the new concept is superior, then the civil law institution must be let go and allowed to float adrift.446 However, if it is determined that the civil law concept is superior, then it should be clearly maintained, and any appropriate modifications should be made.447 A foreign legal concept, merely because it is mainstream, should not be adopted—however enticing or popular such an adoption might be—if it does not clearly prove to be more useful and effective than what is already in place.448

These types of decisions during the law reform process are often difficult. They can give birth to much internal struggle about the true goals and objectives of a particular jurisdiction, as well as how best to meet the mandates of a competitive economy and the

440. See supra Parts I–III.
441. See INTRODUCTION and accompanying discussion.
442. See supra Parts I–III.
443. See supra Parts I–III.
444. See supra Parts I–III.
445. See supra Parts I–III.
446. See supra Parts I–III.
447. See supra Parts I–III.
448. See supra Parts I–III.
modern expectations of a demanding society. \textsuperscript{449} Nevertheless, such challenging decisions must be made so that mixed jurisdictions do not find themselves anchored to the past, and so that they may confidently, deliberately, and effectively set their sails toward the future. \textsuperscript{450}